SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent,

AND

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006,

KALVIN M. GROVE,
LEDERER, BARNHILL & FOX,
Chicago Title & Trust Building, Suite 1837,
111 West Washington Street,
Chicago, Illinois 60602,

DONALD L. GIACOMINI,
ROTHGERBER, APPEL & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Sears, Roebuck and Co., petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit issued in this case on May 15, 1969. That decision, dismissing petitioner's appeal from the District Court's refusal to grant temporary injunctive relief under Section 10(l) of the National Labor Relations Act (29 U. S. C. § 160(l)) was premised on the ground that petitioner lacked standing to prosecute such an appeal.

OPINIONS BELOW.

The opinion of the Court of Appeals dismissing petitioner's appeal (Appendix A, pp. A1-A6), is reported at ..... F. 2d ....., 71 LRRM 2251. An official transcript of the unreported decision of the District Court refusing to grant injunctive relief under Section 10(l) on the basis that no violation of law had occurred, from which decision petitioner sought to appeal, is attached as Appendix B, pp. A7-A13; the subsequent decisions of the National Labor Relations Board and its Trial Examiner, reported at 176 NLRB No. 120, finding that the charged violations of law had in fact occurred are attached as Appendix C (pp. A14-A18) and D (pp. A19-A63), respectively.

JURISDICTION.

The opinion and judgment of the Court of Appeals dismissing petitioner's appeal were filed and entered on May 15, 1969.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioner's appeal is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where a charging party before the National Labor Relations Board has filed charges alleging it was aggrieved by a union's unlawful picketing, which charges, if they have reasonable basis in fact and law, require the Board's Regional Director to seek injunctive relief, and where the Regional Director does find reasonable cause to believe a violation of law was committed and seeks such injunctive relief, may the aggrieved charging party appeal the District Court's refusal to grant such injunctive relief when the Board's Regional Director is unwilling to do so?

A resolution of this question depends, in turn, upon a resolution of the following issues, among others, which it encompasses:

(1) Does the denial to charging parties of the right to judicial review of cases in which they are conferred express rights in lower courts infringe due process of law?

(2) Does an appeal constitute a new cause or only a continuation of the same cause litigated below?

(3) Does the Norris-LaGuardia Act bar aggrieved charging parties from an appeal in an injunction suit of which a court has already, and properly, taken jurisdiction?

(4) Does Congress' silence on the question of charging parties' appellate rights under Section 10(l) require the conclusion that Congress intended to deny them the right to appeal adverse district court decisions when the Board refuses to appeal?

(5) Are the private rights which the Act recognizes enforceable only in situations in which final Board orders issue, or do they exist as well in proceedings under Section 10(l) for interlocutory relief?

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* are set forth in the attached Appendix (App. E., pp. A64-A68).

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioner herein, alleging that Respondent union had engaged in enumerated unfair labor practices within the meaning of Sec. 8(b)(4)(i)(ii)B of the Act, 29 U. S. C.

§ 158(b)(4)(i)(ii)B, which proscribes secondary boycotts by unions. After conducting a preliminary investigation of the charges, as required by Sec. 10(l), Respondent Clyde F. Waers, Regional Director of the Board, concluded that there was reasonable cause to believe that Respondent union was engaging in unfair labor practices, as charged by petitioner and that an unfair labor practice complaint should issue. Thereupon, pursuant to Sec. 10(l), Waers filed a petition in the District Court seeking a temporary injunction against the union's unlawful picketing of petitioner's premises (App. F, pp. A69-A77). A hearing on an order to show cause was held during which the petitioner and Respondents participated, as provided in Sec. 10(l). After presentation of evidence the District Court dismissed the petition for temporary injunctive relief on the grounds that the evidence failed to establish a violation of law and that there was "little probability" that the Board would grant the requested relief when the matter was heard on the merits in formal agency proceedings.

Although Respondent Waers persisted in his belief that the union had committed the charged unfair labor practices, as evidenced by the fact that, on behalf of the Board, he "continued" in the prosecution at the agency level of the complaint issued against the union, he refused to appeal the District Court's denial of injunctive relief. Throughout this period the union continued to picket petitioner's premises. Faced with the union's continuing picketing, with the Board's refusal to appeal, and with the prospect of many months of litigation before the Board, petitioner itself sought to appeal the District Court's adverse decision in order to secure the relief from an unlawful boycott which Section 10(l) was designed to afford.

On February 6, 1969, subsequent to the filing of the appeal but prior to oral argument, a Trial Examiner of

the Board issued a Decision on the merits of petitioner's charges, following a formal evidentiary hearing, in which he found that the Respondent union had in fact committed the unfair labor practices charged.

In its decision of May 15, 1969, the Court of Appeals dismissed petitioner's appeal, holding that petitioners lacked standing to appeal for two reasons: first, since Section 10(l) did not expressly grant that right, therefore Congress did not intend its existence; and second, the Norris-LaGuardia Act, 29 U. S. C. A. § 107, which limits courts' jurisdiction to grant injunctive relief, bars such an appeal by any party except the Board. The Court of Appeals did not reach the merits of the District Court's decision.*

On June 20, 1969, the Board rendered its Decision and Order on the merits of the underlying dispute, in which it affirmed the Trial Examiner's finding that Respondent union had engaged in the illegal conduct charged by petitioner and alleged by the Regional Director in his suit for injunctive relief.

It was only after the issuance of the Board's Decision that the union ceased, at least temporarily, its unlawful picketing. The union's petition for review of the Board's Decision is currently pending in the Court of Appeals for the District of Columbia Circuit.

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* In its decision the court further dismissed petitioner's alternative motion to intervene for the purpose of lodging an appeal; what could not be done directly as a party could not be done indirectly through intervention. It is submitted that this conclusion is contrary to this Court's teaching in *United Automobile Workers* v. *Scofield*, 382 U. S. 205, and to *N. L. R. B.* v. *Acme Industrial Company*, 385 U. S. 432, where, on motion, this Court permitted intervention by a party who had not previously participated at any appellate level. To similar effect is *Wolpe* v. *Poretsky*, 144 F. 2d 505 (CA 4, 1944), cert. den. 323 U. S. 777.

REASONS FOR GRANTING THE WRIT.

Certiorari is sought to review an important question involving the appellate rights of charging parties before the Board in proceedings under Section 10(l) of the Act. To charging parties the existence of this right may be synonymous with economic survival in the face of an adverse decision in the district court which the Board, as here, refuses to appeal for reasons unrelated to the merits of the dispute. To the orderly development of law the issue is significant as it involves a clarification of the requirements of due process of law and of the intent of Congress in enacting Section 10(l), it requires a resolution of a conflict in the circuits, it permits this Court to offer needed guidance to divided courts in the correct application of the Norris-La Guardia Act to injunction proceedings under Section 10(l) of the Act, and it enables this Court to void a decision of the Tenth Circuit which is in conflict with this Court's decision in *United Automobile Workers* v. *Scofield* (*Fafnir Bearing Co.*), 382 U. S. 205.

(1) The Denial to Unlawfully Boycotted Charging Parties of a Right to Appeal an Adverse District Court Decision Denying Them Injunctive Relief Violates Congress' Purpose in Enacting Section 10(l).

In enacting Section 10(l) of the Labor Management Relations Act, Congress expressed its concern over the potential harm to neutral employers victimized by unlawful secondary boycotts by requiring the Board to seek injunctive relief whenever it had reasonable cause to believe that an employer's charge of the existence of such unlawful boycotts was meritorious. Congress emphasized its belief in the importance of affording such injunctive relief to aggrieved employers by imposing a mandatory duty on the Board, acting through its Regional Director:

> "If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he *shall*, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matters." (Emphasis added.)

Having thus expressed its conviction that aggrieved, charging parties are entitled to such relief, it is consistent with this Congressional purpose to deny charging parties the right to appeal a district court's erroneous denial of that relief in circumstances where the Board declines to appeal. To attribute to Congress a purpose to deprive charging parties of the right to such an appeal would render the Congressional scheme inconsistent and idiosyncratic: Congress' concern for the welfare of unlawfully boycotted employers gave rise to the existence of an extraordinary remedy in Section 10(l) on their behalf; the duty to seek it was made obligatory on the Board; in order to assure charging parties the fullest opportunity to obtain the relief to which the violation of their substantive rights entitled them Congress expressly conferred upon them independent participatory rights in the district court proceedings which the Board is required to institute on their behalf:

> "Upon filing of any such petition [for injunctive relief] the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony." (Emphasis added.)

Under these circumstances, and in the absence of any statutory language or legislative history expressly prohibiting charging parties' right to appeal, Congress cannot reason-

ably be understood to have intended to deny them the right to seek review of an erroneous district court refusal to grant appropriate relief in situations where the Board refuses to do so. Such an assumption requires the conclusion that Congress created a substantive right on behalf of charging parties to an injunction of secondary boycotts, yet afforded them no relief from a violation of that right when the Board, for manpower of budgetary reasons unrelated to the merits of the case, declines to appeal an erroneous denial of that relief.[1] Such a construction is illogical and is inconsistent with the statutory scheme to afford appropriate and prompt relief for described prohibited conduct. It is an established principle of this Court to avoid such idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. The opinion below is predicated upon such a construction.

(2) Affirmatively, Charging Parties' Standing to Appeal a District Court's Denial of Injunctive Relief Under Section 10(l) Is Consistent with the Scheme of the Statute.

The fact that the National Labor Relations Act makes no specific reference to charging parties' right to take such appeals does not establish a Congressional purpose to vest appellate rights under Section 10(l) exclusively with the

1. It is true of course, that charging parties' allegations that they had been victimized by an illegal boycott or strike will ultimately be litigated in formal adversary proceedings. In this sense a "remedy" is afforded notwithstanding the denial of injunctive relief. However, this litigation, first before a Trial Examiner, then on review to the Board, extends over many months. When a continuing boycott or strike does irreparable harm to the employer, as the Board's petition for an injunction as well as the statute's provision for injunctive relief admit, then an appealable final order only after so protracted a period constitutes no remedy at all. A victory before the Board, without earlier temporary injunctive relief, would constitute a pyrrhic victory few employers would survive to enjoy.

Board. Rather, Congress' intention must be determined from the totality of the legislative scheme in harmony with ordinary principles of appellate procedure. In *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 11, in the absence of a provision for Court of Appeals stay orders on statutory appeals from the F. C. C., this Court nonetheless upheld "the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal . . . ," and rejected the argument that by its silence Congress had curtailed the parties' right to invoke traditional appellate court powers:

> "These controlling considerations [the existence of time-honored judicial powers and procedures for the prevention of irreparable injury] compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. . . . The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(6). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

Analysis of the statutory scheme, together with the Boards' own rules, reveals clearly that Congress intended charging parties to enjoy the full status as parties, with attendant rights to seek review of adverse decisions, throughout the litigation of cases stemming from their charges with the Board:

(a) In Section 10(b) Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(b) Under the Board's construction of the Act, it has

accorded the charging party the status of a full party litigant in proceedings before the Board.[2]

(c) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the charging party. *Albrecht* v. *NLRB*, 181 F. 2d 652 (CA 7, 1950) and cases there cited;

(d) In Section 10(l) Congress granted to charging parties in district court injunction suits rights which are analogous to those granted them in formal Board proceedings. Section 10(l) expressly provides that the Board's petition for relief in the district court should be served "upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony." These rights are identical to those which the Board confers upon "parties" in its own Rules and Regulations and exceed those which are exercised by an *amicus;* they include the right to shape the record for review, to narrow issues, to offer contentious evidence, to make objections to argue orally, and, by necessary implication, to file briefs.[3]

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2. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the act, . . ."

3. Section 102.38 entitled "Rights of parties", provides as follows:

> "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, . . ."

Section 101.10, defining parties' rights in formal hearings, provides that:

> ". . . all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner."

Accordingly, the fact that the Act is silent on the appellate rights of aggrieved charging parties in injunction suits under Section 10(l), whereas it makes express provision in Section 10(f) for their review of final Board orders, cannot imply a Congressional purpose to forbid such appellate review. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission, supra; Consolidated Edison Company* v. *NLRB*, 305 U. S. 197; *Roberts* v. *NLRB*, 350 F. 2d 427 (CA. D. C., 1965). Rather, the described scheme of the Act, which repeatedly emphasizes the participatory rights of charging parties at all levels and stages of litigation stemming from their charges, implies a contrary Congressional purpose. Moreover, that statutory scheme has frequently led this Court, in other contexts, to recognize the existence of charging parties' appellate rights under the Act in the face of statutory silence, where the Board has not itself sought review. *United Automobile Workers* v. *Scofield, supra; International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335; *United Steelworkers* v. *NLRB*, 376 U. S. 492.

Finally, Congress must be understood to have intended to confer party status, with an attendant right of judicial review, on charging parties in proceedings under Section 10(l) if the statute is not to be rendered anomalous. If Congress did not so intend, then it granted charging parties the right to participate in the district court shaping of the record for review without a right to seek review; similarly, charging parties would have been accorded full party status at all stages of the litigation before the Board itself, at all stages after the Board's final order (via Section 10(f) and *Scofield*), in the district court pursuant to the express terms of Section 10(l), but not in the Court of Appeals prior to a final Board order although their interests there and their need for relief are as great as they are at any of the other stages of the litigation.

There is no basis for inferring a Congressional purpose to create such legislative anomalies.

(3) The Decision Below Is in Conflict with This Court's Decision in United Automobile Workers v. Scofield (Fafnir Bearing Co.).

This Court's decision in *Scofield* argues for the fullest participation by charging parties in the appellate consideration of cases initiated by their charges. Although the precise question involved there related to the right of successful parties before the Board to intervene in review proceedings brought by others, the Court's rationale applies as well to cases under Section 10(l) involving the right to initiate review of adverse decisions damaging to the charging parties' vital interests.

The principal theoretical contribution of *Scofield* to the present issue is the proposition that the Act recognizes and enforces private rights of aggrieved parties, and not merely generalized "public rights." To the extent that a charging party's right to be free of unlawful boycotts is a private right enforced by the judicial process, it is inconsistent to deny the beneficiary of that right the opportunity to act independently to enforce it when the Board refuses to do so. There would be no point to recognizing the distinction between a public and a private right if the private beneficiary were not accorded a role separate from the Board in securing and protecting it. Nor would there exist any real purpose in drawing that distinction if the private beneficiary were not permitted to take all necessary judicial steps, including appeal, to obtain the relief to which the statute entitles him.

In its arguments to this Court in *Scofield* and *Fafnir*, the Board expressly contended that successful charging parties should have no *independent* role in the appellate considera-

tion of their cases because the Board has the exclusive authority to determine whether to enforce its orders, or to seek review, or to withdraw a case from a court of appeals, or to decline to seek certiorari from an adverse decision.[4] In rejecting the Board's contentions, this Court established the right of all aggrieved charging parties to act on their own behalf when the Board refuses to proceed notwithstanding its prior determination that a violation of law had been committed by a charged respondent. There is no sound conceptual basis for failing to apply these principles to charging parties' appeals under Section 10(l).

This Court's reference in *Scofield* to the Judicial Review Act, 5 U. S. C. §§ 1031-42, reinforces this conclusion. The latter statute, which purported to import the procedures of the National Labor Relations Act into the schemes of other Federal agencies, contains the following relevant provisions in § 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right, and be represented by counsel in any proceeding to review such order. . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may *prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein.*" (Emphasis added.)

Since the rights conferred on charging parties in district court proceedings by Section 10(l) constitute them parties in litigation there, the right to "continue such proceeding"

4. Memorandum for the National Labor Relations Board, p. 3; Brief for the National Labor Relations Board, p. 27.

on appeal "unaffected by the action or non-action" of the Board would appear to be favored by this Court by analogy.

The court below, in failing to acknowledge that the charging party-petitioner had an independent—or private—interest to enforce, and by denying petitioner the means by which to enforce it in the absence of the Board's participation, violated the teaching of this Court in *Scofield* and *Fafnir*.

(4) By Denying Petitioner the Right to Judicial Review, the Court Below Infringed Due Process of Law.

Section 10(f) confers specific rights upon charging parties in proceedings in the district courts, including, as previously noted, rights to be present by counsel, to examine and cross-examine witnesses, to introduce relevant documentary evidence, to make objection to irrelevant or prejudicial testimony, to argue orally, to propose findings, and to file briefs.

The decision of the court below, denying petitioner standing to prosecute an appeal from an adverse district court decision, infringes due process of law by depriving petitioner of the opportunity to seek review of a decision stemming from a denial of these rights. Thus the protection of vested rights was there made dependent upon the fortuitous decision of the Board to seek review, an election over which the petitioner can exercise no control. Accordingly, the court below violated the established Constitutional principle that one whose vital interests are at stake in litigation has a right to be heard at every stage of the proceedings in which his rights are, or could be, protected. *Ashbacker* v. *FCC*, 326 U. S. 327. This right includes an opportunity to invoke appellate judicial review. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353.

Moreover, due process of law requires that an opportunity to exercise granted rights be afforded at all levels of the cause in which they are conferred. *Ashbacker* v. *FCC*, *supra*. The court below erred in assuming that the district court proceeding was a separate cause from the court of appeals proceeding seeking to review its decision. Thus the Tenth Circuit conceded the existence of exercisable rights on behalf of charging parties in the district court, which rights disappeared upon the rendering of the latter court's decision.

The error in such a view was recognized as long ago as this Court's decision in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175, in which Chief Justice Marshall stated:

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause."

The court below would foreclose all opportunity to "revise" and "correct" whenever the Board, for any undisclosed reason of its own, determines not to seek to do so.

(5) The Decision of the Court Below Creates a Conflict Among the Circuits Requiring Resolution by This Court.

The Tenth Circuit's dismissal of petitioner's appeal was predicated primarily upon the purported operation of the Norris-La Guardia Act, 29 U. S. C. A. § 107. This statute provides that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . ." with certain stated exceptions not here involved. While recognizing that Section 10(l) of the Labor Act constitutes an exception to Norris-La Guardia insofar as it permits *the Board* to institute suits for injunctive relief, the court below held that an appeal by charging parties of

a denial of injunctive relief is barred; such an appeal, held the court, is analogous to the institution of a petition for an injunction which may not be filed by private parties. In so holding the Tenth Circuit rejected petitioner's arguments (1) that an appeal is a continuation of a suit already instituted and not a new cause, as was stated by this Court in *Marbury* v. *Madison;* (2) that charging parties may support the Board's petitions for injunctive relief, so long as they rely solely on the facts, theories, and arguments of the Board, without such support constituting initiation of a cause; (3) that Norris-La Guardia constitutes a bar only to the institution of petitions for injunctive relief by private parties, not to their support of petitions already filed by the Board; and (4) in any case Section 10(h) of the Labor Act expressly exempts all proceedings under Section 10, including 10(l), therefore, from the operation of Norris-La Guardia.[5]

In rejecting these contentions the Tenth Circuit created a clear and absolute conflict with the views of the Ninth Circuit as expressed in *Retail Clerks Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965).[6] Indeed, the conclusions of the Ninth Circuit formed the basis for the arguments made by petitioner in the Tenth Circuit which the latter court rejected.

In *Retail Clerks*, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a District Court for a temporary injunc-

5. Section 10(h) provides, in pertinent part:

"When granting temporary relief or a restraining order . . . the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C. Supp. VII, title 29, secs. 101-115)."

6. The *Retail Clerks* case was cited with approval by this Court at footnote 17 of its decision in *Scofield*.

tion under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the District Court and sought its approval by that Court in lieu of an injunction. The charging parties objected to the approval of the Stipulation and urged the Court to grant injunctive relief pursuant to the Regional Director's pending petition.

The District Court in *Retail Clerks* recognized the charging parties' right to be heard on their objections to the Stipulation; after hearing the evidence, that Court granted the injunction as the charging parties requested and over the objection of the Regional Director. The union and the Regional Director then appealed from the order granting the injunction.

In his appeal the Regional Director argued that, since the Regional Director had determined to seek a remedy other than an injunction in the District Court, and since only the Regional Director may seek injunctive relief, therefore, the District Court's Order constituted the granting of injunctive relief at the request of private parties in violation of Norris-La Guardia and the policy of Section 10(l).

On appeal, the Ninth Circuit affirmed the District Court and dismissed the Regional Director's appellate arguments as lacking merit.

The Court held that Norris-La Guardia and the policy of the Act require only that the Regional Director must *initiate* suits for injunctive relief pursuant to the mandatory duty imposed upon him by Section 10(l) whenever he has reasonable cause to believe that one of the sections

enumerated therein has been violated. Once he has done so, the limitations of Norris-La Guardia and the policy of the Act cease to inhibit the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. *The distinction between "initiate" and "support" is critical.* Accordingly, the Ninth Circuit held that District Courts may grant injunctions at the urging of Charging Parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

The conflict between the Ninth and Tenth Circuit on the alleged applicability of Norris-La Guardia to efforts to "support" the Board's petition in the district or appellate courts is patent. This conflict requires the attention of this Court.

Moreover, the decision of the Fifth Circuit in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 337 F. 2d 333 (CA5, 1964), represents a further apparent conflict with the decision of the Tenth Circuit on the breadth of the jurisdictional bar imposed by Norris-La Guardia. In the *Houston* case the Fifth Circuit granted a charging party's request for a stay of the Board's order over the objections both of the Board and a dissenting member who contended that the court, in effect, granted injunctive relief to a private party in contravention of Norris-La Guardia.

CONCLUSION.

For the foregoing reasons, it is urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006,

KALVIN M. GROVE,
LEDERER, BARNHILL & FOX,
Chicago Title & Trust Building, Suite 1837,
111 West Washington Street,
Chicago, Illinois 60602,

DONALD L. GIACOMINI,
ROTHGERBER, APPEL & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

APPENDIX A.

UNITED STATES COURT OF APPEALS,
Tenth Circuit.

March, 1969, Term

Filed United States Court of Appeals, Tenth Circuit, May 15, 1969. William L. Whittaker, Clerk.

SEARS, ROEBUCK AND CO., CHARGING PARTY AND COMPLAINANT BEFORE THE NATIONAL LABOR RELATIONS BOARD,
Appellant,
vs.
CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,
Respondent-Appellee,
CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner-Appellee.

No. 6-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

Gerald C. Smetana, Chicago, Illinois (Donald L. Giacomini, Denver, Colorado, and Kalvin M. Grove, Chicago, Illinois, on the brief) for Appellant;

Philip Hornbein, Jr., Denver, Colorado, for Respondent-Appellee;

Julius G. Serot, Assistant General Counsel, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, and Marvin Roth, Attorney, Washington, D. C., on the brief) for Petitioner-Appellee.

Before MURRAH, *Chief Judge*, and LEWIS and HILL, *United States Circuit Judges*.

HILL, *Circuit Judge*.

This is an appeal by Sears, Roebuck and Company, the charging party and complainant before the N. L. R. B., from an order of the district court dismissing the petition of the Regional Director for a preliminary injunction under section 10(l) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(l). The Regional Director did not appeal from the denial of the injunction and asserts that consequently this court does not have jurisdiction to consider the merits of the matter because Sears lacks the necessary standing to prosecute this appeal.

Sears originally filed a charge with the Board alleging that the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, was picketing Sears in furtherance of a dispute with Joe and Eddie's Carpet Service, a firm employed to install floor coverings sold by Sears. After investigating the charge, the Regional Director concluded that there was reasonable cause to believe that the Union was engaged in picketing in violation of section 8(b)(4)(i)(ii)(B) of the Act, and that a Board complaint based on that charge should be issued. Pursuant to the mandate of § 10(l), the Regional Director then filed a petition for an injunction with the district court pending final disposition of the complaint

before the Board. As the charging party, Sears was notified, in accordance with the provisions of § 10(l), of the filing of the petition and the time and place of the hearing to be held by the district court. At that hearing the party litigants, the Board and the Union, presented evidence to support their contrary positions on the unlawful picketing issue underlying the Board's quest for an injunction. Sears put in an official appearance but did not participate in any meaningful fashion. The court considered the various contentions of the parties and concluded that the Board had failed to sustain a case for injunctive relief. The Regional Director decided to accept the judgment of the court but Sears disagreed and instituted this appeal.

The Board takes the position that Sears was not a party to the § 10(l) court proceeding and cannot appeal therefrom. This is said to follow from the fact that § 10(l) merely provides that the charging party "shall be given an opportunity to appear by counsel and present any relevant testimony." It is argued that to expand that grant of limited participation into a full scale right to appeal when the Board declines to do so, would be not only to ignore the plain meaning of the statutory language, but would constitute a total disregard for the overall scheme of labor injunction treatment embodied in the N. L. R. A. and the Norris-La Guardia Act.

Sears counters by stressing that § 10(l) is an exception to the general prohibition against labor injunctions, which to be fully understood requires that a distinction be made between "institution" of an injunction proceeding and "subsequent acts in support thereof." Sears claims that Norris-La Guardia is concerned only with the institution of such petitions and that once the Board has filed the petition pursuant to § 10(l),[1] Norris-La Guardia no longer

1. Section 10(h) exempts section 10 proceedings from the operation of Norris-La Guardia. Hence, when the Board invokes § 10(l) the district court has jurisdiction.

operates as a barrier. Thus § 10(l) should be interpreted as granting charging parties all the rights of full juridical parties, including the right to appeal. We cannot agree and must conclude that Sears lacks the necessary standing to undertake this appeal.

It is not necessary to repeat the history of abuses that prompted the Norris-La Guardia Act, nor to belabor the public policy formulated therein. The language of that Act clearly indicated that "Congress was intent upon taking the federal courts out of the labor injunction business . . ." *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369 (1960). Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the court; the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted.[2] Viewed in that context, the limited rights conferred upon a charging party in a § 10(l) proceeding, the right "to appear by counsel and present any relevant testimony," must be taken to mean just that, no more and no less. To read into that restricted right of participation, the right to initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem.

Section 10(l), and its counterpart § 10(j), were designed to provide temporary injunctive relief pending the final adjudication of the Board. The temporary relief is allowed only upon the filing of a petition by the Regional Director. It is his view of the facts and law that the district court is to consider. "The courts are not free to roam at will over every aspect of a labor dispute upon the request of the

2. The Supreme Court has repeatedly cautioned against judicial dilution of Norris-La Guardia, *e.g.*, *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940).

charging party. * * * [T]he principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." *McLeod* v. *Business Machine & Office App. Mech. Conf. Bd.*, 300 F. 2d 237, 243 (2d Cir. 1962). When the Board declines to appeal an adverse district court decision, the charging party may not initiate an appeal, for then the charging party would become the principal complainant, in defiance of the scheme of the Act to the contrary.

The cases relied upon by Sears, namely, *Automobile Workers* v. *Scofield*, 382 U. S. 205 (1965) and *Retail Clerks Union* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965), are distinguishable and of limited assistance here. In Scofield the Court held that both the successful charging party and the successful charged party have a right to intervene in the court of appeals proceeding reviewing a final Board order. Section 10(f) of the Act expressly provides for the right of an aggrieved party to obtain judicial review, the Court determined that "Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before an agency." 382 U. S. at 216. No plausible theory has been advanced to justify extending the reasoning of Scofield to the totally unrelated issue presented here. Sections 10(l) and 10(f) deal with completely different situations. The temporary injunctive relief provided by § 10(l) does not contain elements of multiplicity of appeals or stare decisis that concerned the Court in its consideration of the § 10(f) question.

In Retail Clerks the court reviewed the action of a district court that had granted a temporary injunction after the Board had attempted to withdraw a § 10(l) petition. In upholding the right to grant an injunction after consid-

ering evidence introduced by the charging party, the court observed that to do otherwise "would make the district court's action a mere rubber stamp for the Regional Director." 351 F. 2d at 530. The precise holding of the case thus relates to the conduct of § 10(l) petitions in the district court and can have no direct bearing upon the right to appeal at issue here. Moreover, any implications to the contrary that might be drawn from the decision, are completely dispelled by the fact that the court denied the request of the charging party to intervene at the appellate level. If the court had intended to accord charging parties equal status with full party litigants, there would have been no need to intervene and certainly no justification for requiring the parties to appear as amici curiae.

In sum, we conclude that to grant a charging party the right to appeal, a right ordinarily reserved to party litigants, would constitute an unwarranted expansion of the more limited rights conferred by the express language of § 10(l). Such an expansion, if there is to be one, must originate from other sources.

Sears urges in the alternative, that if the contention that it is already a party in the § 10(l) proceedings is rejected, then permission should be granted to allow it to intervene in order to prosecute this appeal. What has been said with regard to the right to appeal as a party, applies with equal force to the assertion of a right to appeal as an intervenor. Section 10(l) confers specific limited rights upon a charging party. The right to initiate an appeal is not one of them. What cannot be obtained directly by asserting a right to appeal as a party, cannot be obtained indirectly through intervention. Cf. *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D. N. Y. 1966).

APPEAL DISMISSED.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado.

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of THE NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*.	Civil Action No. C-1052.

(Filed United States District Court, Denver, Colorado, Oct. 4, 1968. G. Walter Bowman, Clerk.)

REPORTER'S TRANSCRIPT.

BE IT REMEMBERED, that the above-entitled matter came on for hearing before The Honorable William E. Doyle, Judge, presiding, Courtroom D, U. S. Court House, Denver, Colorado, at or about the hour of 3:00 o'clock p.m. Friday, September 27, 1968.

Appearances:

J. Richard Wise, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; and

[2] Francis Sperandeo, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver Colorado; and

W. Bruce Gillis, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; on behalf of Petitioner.

Donald L. Giacomini, Esq., Attorney at Law, Security Life Building, Denver, Colorado, appearing on behalf of Sears Roebuck & Co.

Philip Hornbein, Jr., Esq., Attorney at Law, 2007 Security Life Building, Denver, Colorado, appearing on behalf of Respondent.

Whereupon, the following proceedings were had, to wit:

[3] Proceedings.

The Court: I asked you to come in today so that I could give you my views of the case. Because, I think there is some urgency about it from the standpoint of both sides. I just received the last memorandum a couple of days ago. I have been buried in trials and other work. So I thought it would be helpful to both of you if I were to just, the best I can, give you my expression as to how I feel about it.

This is an action in which the plaintiff, Waers, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, on behalf of the National Labor Relations Board, seeks injunctive relief against the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, charging that the respondent has been guilty of an unfair labor practice and that it has been picketing the Sears, Roebuck outlets; Cherry Creek and on West Sixth Avenue.

It is alleged that Joe and Eddie's Carpet Service, a partnership, engaged in the business of carpet installation; that that company—that association—together with others who are mentioned in the Complaint furnished service to

Sears. The allegation is that in essence these installers are in a relationship of independent con- [4] tractors to Sears and, thus, the organization's efforts on the part of the respondent are a violation of Section 8(b)(4) of the National Labor Relations Act.

We heard evidence in the matter, which was a question of fact, basically.

I find and determine that the Court has jurisdiction over the case. I note in passing that at the conclusion of the evidentiary hearing, that I made certain findings, and I might run over them now.

At that time I said, "It appears to me that it's not an ordinary employee relationship; that Sears does, however, contract the whole job; that is, the carpeting or floor covering, plus the services. And, carrigs the responsibility of seeing to it that the job is satisfactory, because it is a Sears customer. It does not appear, however, that the employee is subject to regular hours; doesn't appear that he gets any of the fringe benefits that other employees get, such as health and welfare benefits and perhaps a pension; the profit sharing; and some other things that were described that are available to ordinary commissioned or salaried employees at Sears, Roebuck."

The evidence showed that each of them was eligible, on a one day discount pass, whereby they could buy merchandise for ten percent off.

I went on to say: "On the other hand, it does [5] seem to me that Sears has a vital interest in the price of this from what has been presented here because they want to compete in the community. Perhaps more than that, they wish to be able to keep their prices below those of other concerns. And so, this is evident from the fact and the testimony that they have recently found that their margin

of profit was nil because the service was eating it all up. So, they insisted on having a $1.35 rate per yard."

And then I said: "Is that right?" And Mr. Wise answered: "Yes."

The evidence shows, as I recall it, that the overall price had been $1.65, and the installers were paying some of the extra expenses such as moving furniture and taking up old carpeting. And, that Sears then negotiated this lower rate.

I then went on to say: "And these facts are pretty well established and undisputed. On the other hand, these fellows appear to be entrepreneurs in some degree because they can take up their work. As I say, they don't get the other benefits that Sears offers its employees, although they get a ten percent discount on request and application. Isn't that right? Mr. Wise: Yes, sir."

Then I said, "So under these circumstances, I guess the matters are really conclusions of law more than they are findings of fact, aren't they?" And, it was mentioned [6] that the installers are ultimately responsible for guaranteeing their workmanship and certainly this is true. And, Mr. Wise said: "The contract does state the installers are responsible for guaranteeing their workmanship and so on and have to pay for any damages which would not make Sears entirely responsible." And I say, "They have to indemnify Sears. For bad workmanship." For example.

I go on to say: "Sears continues to bear the responsibility so far as the customer is concerned. Mr. Wise: I think this is because of the economic factors."

Then I say, "Also Sears is responsible for collecting. The testimony is undisputed that these contractors have nothing whatsoever to do with collecting from the purchaser. Sears does this through its machinery; its credit plan or

system. And, if there is a loss as a result of a bad debt or bankruptcy, why, Sears bears the risk of the loss."

I might also add that the relationship arises as a result of the printed contract between Sears and the installer. It doesn't say that here, but I say it. It's prepared by Sears. It sets forth the various stipulations between it and the installer.

All right. It's a very interesting question as to whether—as to the basis for Board action or for a holding of unfair labor practice, but my view is that it's [7] not—that there is no probability even that the Board will so find. Section 8(b)(4)(A) or Section 8(b)(4)(B), under the 1959 amendment is designed to protect innocent third parties, as I see it, from economic loss as a result of a labor dispute in which they have no concern. This was mentioned in NLRB against Brotherhood of Carpenters and Joiners, 184 F. 2d, p. 60. There are a couple of District of Columbia cases that I think are pertinent. One is Local Union No. 24 of the Teamsters against NLRB, 266 F. 2d 675 at p. 680. This was in the D. C. Circuit, 1959, wherein the court says: "Arrangements of the type here disclosed must be scrutinized by the Board with great care because of the danger that they may be used by the real parties in interest as a device to achieve insulation from union activity." Citing cases. And, citing Local No. 24, Teamsters against National Labor Relations Board, 105 U. S. Appeals, D. C. 271, 276; 266 F. 2d 675, 680 (1959).

And, it goes on: "Of course, in an area so wide as is the field of Labor Relations, there are many situations in which the answer to a dispute under 8(b)(4)(B) is easily derived by the application of such legalistic formulae as 'independent contractors, co-employers, or allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived

by applying the intent of the statute to the facts [8] in the case.

"The inquiry in the present case was limited to whether Todaro was an 'independent contractor'. We think it clear, however, that Todaro's relationship to Terminal was in the 'zone of dispute in which such formulae are useless' and that 'applying the intent of the statute to the facts in the case' required consideration of such facts as, for example, the history of Todaro's relationship to Terminal; the conduct of his cleaning business and its relationship to Terminal's business; the Terminal's influence on, if not control over, Todaro's labor policy. In our view, these facts make inescapable the conclusion that Terminal was not a neutral within the meaning of the statute."

So the question should be whether the respondent is neutral. I'm not sure. I'm convinced that a categorical approach to this in terms of common law relationship is not the proper approach, since this is an effort to charge and convict the respondent of an unfair labor practice which in essence is a secondary boycott. The other side of this is that a person boycotted must be someone who is wholly secondary and lacking interest in the controversy; someone who is an innocent bystander, so to speak. And I do not see—looking at the facts here, it's plain to me that the relationship is not that of employer-employee, but at the same time I think that it is somewhat a legalistic relation- [9] ship; an arrangement. And, that a real effort has been made to see to it that it looks like an independent contractor relationship.

The Board itself in a case that is quite similar to this reached the same conclusion that I reach. I refer to Local No. 2265 against Carpet Center, Inc., Case No. 7-CC-397, in which the facts are quite similar.

I would say this; that this one was somewhat stronger

than the case at bar in that there was a closer relationship between the petitioner and the carpet layers. But, in the course of the trial, the examiner went on the ground that this was in substance, in reality, an employee relationship.

I do not think that I have to so find. I think that it's sufficient to find and determine and hold as I do that Sears is vitally interested in the price—in the installation price. The installation price was the big element in the total price that was charged the customer. And so, it was vitally interested in whether or not the installers were members of the respondent union. They were not strangers. They were not innocent neutrals. And consequently, I do not see that this case is one for the issuance of injunction, which is extraordinary relief, even though it is statutory. I agree it is. I see little probability that when this matter comes before the Board that [10] the relief that is sought will be granted.

That being the case, I do not think that the petitioner makes out a case for temporary injunctive relief here.

So, the request of the petitioner will be denied and the Complaint will be dismissed and the cause of action will be dismissed. This is a final judgment.

APPENDIX C.

176 NLRB No. 120 D-2074

Denver, Colo.

UNITED STATES OF AMERICA,
BEFORE THE NATIONAL LABOR RELATIONS BOARD.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, and SEARS, ROEBUCK AND CO.	Case 27-CC-278.

DECISION AND ORDER

On February 6, 1969, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed an answering brief and cross-exceptions with a supporting brief.

Pursuant to the provisions of Section 3(b) of the Na

tional Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following clarification.[1]

We agree with the Trial Examiner's findings, based on the application of the "right to control" test to the particular facts of this case, that the floor covering installers involved herein, who perform services for Sears, Roebuck and Co., are independent contractors. Further, we agree that there is no basis for finding Sears to be an "ally" of the contractors in their dispute with the Respondent.

As more fully set forth by the Trial Examiner, all of the installations are accomplished by separate enterprises, which have other customers in the Denver area. These businesses are operated from the homes of their owners, who perform no work on the Sears' premises. They operate with their own business trucks, tools, materials, bank accounts and liability insurance, and they wear no Sears' uniforms of any kind. The installers are responsible to repair any of their work which is defective and to pay for any damage. The installation enterprises set their own daily work limitations and schedules and on occasion several have subcontracted Sears' jobs without prior approval or knowledge of Sears. Although the contracts

[1] The Respondent's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions, cross-exceptions and briefs, adequately presents the issues and the positions of the parties.

between Sears and the installers call upon the contractor to refrain from doing extra work for Sears' customers without written authorization, the practice is clearly to the contrary. Unlike Sears' employees, the installers' relationship with the company is not governed by the personnel manual, nor do they have to take the physical examination required of all Sears' employees, and none of the contractors or their employees receive any employee benefits from Sears, except an occasional 1-day discount which is also available to police and firemen, among others. Those installers who perform services with their own employees pay such assistants at rates fixed solely by them and deduct from their wages all necessary items such as social security and taxes. On the other hand, the contractors are paid by Sears without any such deductions.

Contrary to the Respondent's contention, the facts of this case are clearly distinguishable from those in *Carpet Center*.[2] Unlike the particular indicia of control retained by the retail carpet dealer in that case, the record here shows that the installers can and do schedule work for other customers on the days they work for Sears and they determine the order of performance. Furthermore, Jose and Eddie's Carpet Service, one of the installers herein, reschedules work by arrangement with Sears' customers without notifying Sears. None of the installers are supplied with precut or presewn material, or with instructions on how to get to a customer's premises. The contractors need not report to Sears daily or at any given time, and assignment of work is not based on where the installers live. Although the contractors are presumably required to give Sears notice whenever they will be unavailable for work because of vacations, sickness, or for some other

[2] *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93

reason, there is some record evidence that such notices are not given. The price lists which were arrived at through negotiations between Sears and the installers reflect the fact that the contractors are paid according to the difficulty of the work, instead of a single rate per square yard. The installers can and do change the prices set forth on work orders if for any reason they do not accurately reflect the actual work performed. Generally the installers are supplied with a room layout showing the areas to be covered and on occasion the seams to be sewn; however, they may and do disregard said layouts if they believe they can perform the job in a more satisfactory manner. Furthermore, if in their judgment a job cannot be completed satisfactorily the installers can and do reject the assignment.[3]

From the foregoing, it is apparent that the Sears' installers clearly have a far greater scope of decision-making power than those in *Carpet Center* and *Arnold's Carpet* and are independent contractors.

Having found that the installers are independent contractors and that Sears is not sufficiently related to the contractors to destroy its neutrality, we adopt the Trial Examiner's further findings that Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing Sears, with an unlawful object of forcing Sears to cease doing business with the installers, including Joe and Eddie's Carpet Service, with whom the Respondent had a dispute.

3. The instant case is also distinguishable from the recent decision in *Carpet, Linoleum and Soft Tile Layers Local No. 1238 (Arnold's Carpet)*, 175 NLRB No. 50, in that here there is substantial record evidence that the installers can and do exercise independent judgment over the manner of cutting and piecing together the carpet. We also note that whereas the installer in *Arnold's Carpet* received weekly payments, the Sears contractors may be paid by the job or whenever they desire.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 20, 1969.

FRANK W. MCCULLOCH,
Chairman,

GERALD A. BROWN,
Member,

SAM ZAGORIA,
Member,

(SEAL) *National Labor Relations Board.*

APPENDIX D

TXD-(SF)-13-69
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Branch Office
San Francisco, California

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, and SEARS ROEBUCK AND CO.	Case No. 27-CC-278

Mr. Richard J. Wise, Denver, Colo.,
for the General Counsel.
Mr. Philip Hornbein, Jr., Denver, Colo.,
for Respondent Union.
Lederer, Barnhill and Fox, by
Mr. Kalvin M. Grove, Chicago, Ill.,
for Complainant Company.

DECISION OF THE TRIAL EXAMINER

STATEMENT OF THE CASE

Maurice M. Miller, Trial Examiner: Upon a charge filed and duly served, the General Counsel of the National Labor Relations Board caused a Complaint and Notice of Hearing to be issued and served upon the parties herein.

(The Complainant, Sears, Roebuck and Co. had filed the charge on August 9, 1968; General Counsel's Complaint issued August 29th. All dates cited within this decision refer to 1968, unless otherwise noted.)

Flooring Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as Respondent Union herein, was charged with the commission of certain unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A)(B)(3)(B) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. Copies of the Complaint and Notice of Hearing were duly served upon the respondent labor organization. Within Respondent Union's duly filed answer, certain factual statements in General Counsel's Complaint are conceded. Respondent Union, however, denies the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to the issues was held at Denver, Colorado, between October 8th and October 11th, before me. The General Counsel, Respondent Union, and Complainant were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues.

At the time before the hearing closed, Respondent Union's counsel requested a subpoena be issued

Counsel's witness, Massey, who had previously been excused following the completion of his testimony, counsel then proposed his recall as Respondent Union's witness. While testifying first, in General Counsel's behalf, Massey had proffered certain testimony which a subsequent witness for General Counsel, Harris, partially contradicted. Respondent Union's counsel contended that Massey's further testimony with respect to the particular matters involved thus in contradiction regardless of whether he maintained a disagreement with General Counsel's subsequent witness or resolved their clearly discrepant testimonial recollections would be both relevant and material. The following day, when the parties' testimonial presentations were, in all other respects, complete, the witness sought by Respondent Union's counsel had, presumptively, not been served; he did not present himself when called. Respondent Union's counsel, then, requested that the record be kept open and the hearing continued, so that Massey's further testimony, regarding the discrepancy between Harris' recollection and his, could be received at some later date. Following a recess colloquy, I concluded that such further testimony, depending upon its conceivable tenor, would either be immaterial or merely cumulative. Counsel's request that the record be kept open and the hearing continued, therefore, was denied. Upon further consideration, I remain persuaded still that the disposition of counsel's request has worked no prejudice, with respect to Respondent Union's defensive presentation. *N.L.R.B. v. Thurston Instrument and Electronic Company*, 344 F. 2d 863, 59 LRRM 2175, 2176 (C.A. 9). My ruling is reconfirmed.

Since the hearing's close, comprehensive and well prepared briefs have been received from counsel for the General Counsel and Complainant. These have been duly considered

Findings of Fact

Upon the entire testimonial record, documentary and film evidence received, and my observation of the witnesses, I make the following findings of fact.

I. Jurisdiction

Sears, a New York corporation, maintains several retail mercantile establishments both within and near Denver, Colorado, at five locations. Three of these are retail stores.

(Customarily, these are designated as the Cherry Creek store, Westland store, and Northglenn store, respectively.)

Upon them, likewise, maintains a warehouse, with a separate catalogue service location. Respondent Union's course of conduct, challenged herein as violative of the statute, affected Complainant's Cherry Creek store and warehouse merely.

In the course and conduct of its business operations, Sears has sold and distributed through its Cherry Creek store specifically goods and products valued in excess of $[illegible],000 yearly. Likewise, Sears has purchased, transferred and delivered to its designated store, and warehouse, goods and materials valued in excess of $[illegible] yearly, which goods and materials were transported to Complainant's store and warehouse directly from states of the United States other than the State of Colorado.

Upon these facts, which are conceded to be correct, I find that Complainant is now, and has been throughout the period with which this case is concerned, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities wholly affect commerce within the meaning of Section 2(6) and (7) of the statute.

With due regard for those jurisdictional standards which the Board presently applies (see *Stevens Mailing Service*, 122 NLRB 81, 43 LRRM 1056, and related cases), I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II The Respondent Union

Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as "Respondent Union" within this decision, is, concededly, a labor organization within the meaning of Section 2(5) of the Act, as amended. Throughout the period with which this case is concerned, I find, George Cooney, Respondent Union's financial secretary and business manager, together with Paul Wishard and Richard Geisler, field representatives, have been agents of the designated respondent, functioning on its behalf, within the meaning of Section 2(13) of the Act, as amended.

III The Unfair Labor Practices

A *Issues*

In connection with Sears' general mercantile operations, the firm sells floor coverings at retail. The floor coverings sold comprise soft surface (carpet), together with hard surface (linoleum and tile), materials. In most cases, the firm sells not only the floor covering materials but likewise, whatever installation services may be required. The customer pays a single price, calculated to cover Sears' selling price for necessary materials purchased together with a labor selling price, plus any charges related to credit terms which the particular customer may request or require. Whenever Sears' floor covering sales compass installation work, responsible Sears representatives finally "assign" such work to various floor covering installers, under circumstances which will be noted.

This case derives from a series of picket line confrontations between representatives of Respondent Union, on the one hand, and, on the other, Joe Brase and Eddie Stimac, doing business as Joe and Eddie's Carpet Service Company, together with Sears, through its Cherry Creek store and warehouse specifically. Thereby, so General Counsel contends, the Respondent Union, through its representatives, induced and encouraged various Sears employees together with individuals working for other persons engaged in commerce to cease performing services for their respective employers. Further, General Counsel contends that Respondent Union likewise threatened, coerced, and restrained Sears, together with other persons engaged in commerce. Such conduct was undertaken—so General Counsel herein charges—with the unlawful object, in each case, of forcing or requiring Sears to cease doing business with Joe and Eddie's Carpet Service, and certain other floor covering installers variously designated. Respondent Union denies the statutory violations charged. Further, Respondent Union contends, affirmatively, that all floor covering installers working on Sears' jobs function as company workmen; that Sears fixes and controls their wages and working conditions; that those wages and working conditions are inferior to those generally prevailing throughout the floor covering industry within the Denver metropolitan area; that such wages and working conditions, therefore, jeopardize the prevailing standards for wages, hours, and working conditions set through collective bargaining for Respondent Union's members; that Respondent Union thus has a so-called primary labor dispute with Sears concerning the wages, hours, and working conditions which Complainant has fixed for floor covering installation workers; that Sears is not a neutral or disinterested party with respect to that dispute; and that Respondent Union's conduct, challenged herein as violative of law, should, there-

fore, be considered protected and concerted activity, on both statutory and constitutional grounds.

B. *Facts.*

1. Preliminary Statement.

How Floor Covering Is Sold.

At Sears' metropolitan Denver area stores, the specific department or division which handles floor covering sales is known as Division 37; such departments or divisions are maintained at the Cherry Creek, Westland, and North glenn stores.

Generally, prospective customers visit the floor covering department of some Sears store; there, they may discuss with a salesman preliminary the type of floor covering they presumptively desire to purchase. The salesman, usually, tries to arrange a visit within the customer's home; when successful, he brings samples calculated to help the customer select whatever floor covering he may desire. Should the customer indicate that a complete job, with installation service, is desired, the salesman will prepare a Floor Covering Estimate and Proposal document; having seen the specific floor area or areas which the customer wishes covered, the salesman will calculate both the price of the carpet or hard surface covering materials required, and estimated material installation charges. Both figures will be noted, within appropriate spaces, on Complainant's Estimate and Proposal form (Six copies of the proposal are normally prepared. The copy titles vary from one copy to another; they correspond with the first copy, however, in most major respects.)

When the customer accepts his so-called "final" proposal for both materials and labor, the salesman will normally

draw a diagram of the space or spaces to be covered, within a graph marked A section which the firm's Estimate and Proposal form provides. This drawing will show the rooms to be covered, the type of material required, and sometimes where seams should be sewn or laid.

Following the document's preparation, when a final consensus with the customer regarding various details, such as credit terms, has been reached, the complete Estimate and Proposal is signed, in multiple copies, by the parties. The salesman then retains the document, minus the customer's copy, together with a sales check, to Sears' store. The reverse side of the customer's retained copy of the proposal form, on the record shown, contains the following language:

> Instructions: It is understood that Sears will not install said materials but that by the acceptance of this proposal you authorize Sears to arrange with a contractor licensed where required to make the installation, you authorize Sears (1) to make to said contractor an installation work order with these specifications, (2) to inspect the installation upon completion thereof, and (3) to pay the contractor his charges for such installation upon our execution of a completion certificate establishing that the installation has been satisfactorily completed. You agree to pay to Sears the amount specified in said which will cover the price of said materials and the installation charges.

When the customer has proposed a credit purchase, the complete Estimate and Proposal is submitted to Sears' credit department for review. Likewise, if the customer's credit terms must be approved, the proposal is submitted to the proper [illegible] Manager. The latter, then, checks the document's correctness.

When the particular Estimate and Proposal has received the [illegible] Manager's approval, the necessary [illegible] copies [illegible] and [illegible] are placed in a sub-

folder, which is normally sent to Sears warehouse installation department, or some particular store's customer service department, for further processing.

(With respect to hard surface floor coverings—linoleum and tile—such processing is centralized at Sears' warehouse, under Installation Manager Donald Chandler's supervision. Chandler is responsible, likewise, for the processing of carpet installation orders received from Sears' Cherry Creek store. Sears' other store Division Managers, McNally at Westland and Meyers at Northglenn, are responsible for processing carpet installation orders which originate at their stores.)

The store salesman generally next places an order for whatever materials may be required. Carpet is procured, generally, from direct sources—that is, the carpet mills—or from Sears' [and stock warehouses. Linoleum and tile are normally carried in stock at the warehouse.

Following a sale's conclusion, the salesman generally gives the customer an approximate period within which the material may be expected, and notes (three or four days thereafter) as the customer's estimated installation date. Normally, when the goods required have been made available either from Sears' warehouse or from some direct source—whether hard surface or soft surface materials are involved—the job folder connected with the particular sale will be received from a file for further handling, by a representative in Sears' warehouse, or store customer service department.

[For present purposes, this description of Sears' procedures related to handling floor covering job orders will be rather generalized. The process will be detailed further, later, when the nature of the relationship between the Chandler unit and various floor covering retailers must be considered.]

Sears' installation department or customer service representative, first, communicates with the designated customer, to determine the best, most appropriate time for material installation, consistent with both the customer's needs and the projected availability of required installers. When this determination has been made, the necessary installation work is assigned to some particular installer. Requisite copies of Sears' job documents designated "General Order to the Contractor" specifically are replaced in the job folder which the installer will subsequently procure; these folders are, then, placed, within properly designated boxes or slots, depending on the store, for each installer's subsequent pickup.

(The Complainant maintains current working relationships with some sixty installers; this number includes those who perform floor covering work. At Sears' warehouse, each of them has a pigeonhole within which their particular job orders are placed. At Westland, such job orders are made available within the store's customer service department.)

Most installers, generally visit the warehouse or particular store within which they do business, daily; at such times, they will customarily pick up their work orders. They then procure the material required for the job which they will be required to perform on any given day, proceed to the jobsite, and perform whatever work may be required.

When their particular jobs are completed, the installers concerned pursuant to their more or less regular practice submit one copy of Complainant's relevant Estimate and Proposal, together with their conventional invoice form, for payment.

Hard surface floor coverings — linoleum and tile — which Sears sells is normally installed by Frank Harris, doing business as Frank Harris Tile Company, and by Daryl

Massey, doing business as Duke's Floor Covering; other linoleum and tile installers who sometimes receive work from Complainant herein, however, include Joseph Mozzicato, John Erpelding, doing business as Sea-Ro Tile Company, and Gerald Fiduert, doing business as G. & H. Tile Company. Soft surface floor covering sold from Sears' Westland store has been installed by Joe and Eddie's Carpet Service Company. Before Respondent Union commenced the picketing with which this case is concerned, soft surface coverings sold through Cherry Creek were installed by Crowe Carpet Service; since Respondent Union began picketing, however, Cherry Creek installations have been handled by Joe and Eddie's and by Paul E. Clark, d b a Clark Carpet Service. So far as the record shows, these constitute the full complement of floor covering installers working out of Sears' warehouse and Cherry Creek store.

Respondent Union's Picket Line.

Sometime in July, 1968, Joe Brase and Eddie Stimac, together with a worker in their hire, Charles Duran, went to a Sears customer's home to perform a repair job. When they reached the customer's residence, Respondent Union's field representative, Wishard, appeared. Brase and he had a conversation.

(Stimac, who was present, testified that the conversation occurred in July. Brase—likewise, first recalled the event as occurring in July, but — during cross-examination — testified that it occurred in the middle of May. Upon this record, I am satisfied that the testimony preponderantly warrants a determination that the conversation took place in July, consistently with Stimac's testimony and Brase's first recollection.)

Wishard asked whether Stimac and Brase would consider joining the Union. Brase, however, responded negatively,

declaring that they were partners and would be unable to maintain their partnership — consistently with their understanding of Respondent Union's relevant rules — unless they had two or more employees. Wishard then left, but returned shortly thereafter. About fifteen minutes later, Field Representative Geisler joined him, bringing some picket signs. Wishard, then, requested Brase to state what his "outfit" was called. Brase replied that he could not do so; Wishard, however, declared that his, (Brase's), name was known. Respondent Union's field representative then printed the name "Joe Brase" within blank spaces on the picket signs which Geisler had brought; both men commenced picketing. Joe and Eddie's repair job took approximately 45 minutes to complete; within that period, Wishard and Geisler carried their picket signs on the sidewalk, before the customer's home, for approximately thirty minutes.

> (Respondent Union, through its counsel, has conceded that a picket sign was carried near the customer's residence. Counsel declared, however, that the sign which was carried contained the name "Sears, Roebuck and Co." but did not contain Brase's name, that of his partner, or their partnership designation. Respondent Union has produced no testimonial support for its counsel's declaration regarding the business enterprise designated; neither Wishard nor Giesler was called to testify. Brase's testimony regarding the picket sign's language, therefore, stands without record contradiction; that testimony is credited.)

When their job was completed, Brase, Stimac, and Duran went to a nearby coffee shop. They were joined, there, by Wishard and Giesler; Wishard renewed their earlier conversation. He declared that Joe and Eddie's Carpet Service was rumored to be doing Sears' work, that they were non-union, that Respondent Union did not like it, and that

"they" wanted Duran and both partners to join. He also reported that Putsche of Crown Carpet Service had complained, and that "they" had to "take care of" the boys. Brase, Stimac and Duran, however, joined in telling Wishard that they were not interested in becoming Union members.

On August 7th and 8th, thereafter, Respondent Union's representatives picketed Sears' Cherry Creek store. The first day, they picketed on the public sidewalk, adjacent to the store's south entrance, between 9:30 a.m. and 12:30 p.m.; on August 8th, Respondent Union picketed between 11:30 a.m. and 1:00 p.m. before the same store entrance. Since August 8th, further [illegible] and continuing, to date Respondent Union has picketed Sears' warehouse.

(This picketing has, likewise, been conducted on public property except for three or four days at the commencement of the picket line, when it was maintained on Sears' property. The pickets, however, moved when requested.)

The sidewalk picketing at Sears' Cherry Creek store was conducted by two pickets; near the warehouse, one or two persons have carried picket signs at various times. The signs which were carried before the Cherry Creek store, and which are still being carried at Sears' warehouse read as follows:

Front

FLOOR COVERING SOLD BY
SEARS ROEBUCK & CO
IS INSTALLED BY
UNDERPAID WORKERS
CARPET & LINOLEUM LAYERS
LOCAL #419

Reverse

NOTICE
FOR TOP QUALITY
WORK PATRONIZE
FIRMS EMPLOYING
UNION CARPET
& LINOLEUM LAYERS

The warehouse picketing is currently being conducted outside the only gate which provides warehouse access, Sears'

entire property being enclosed by a chain link fence. The picketing, generally, compasses the hours from 8:00 to 5:00 o'clock, which constitute the warehouse's working hours.

Lawrence Richardson, Sears' warehouse personnel manager and operating superintendent testified—without challenge or record contradiction—that some warehouse deliveries have been delayed, or have not been made, as a result of Respondent Union's picketing; he declared that Sears has been so advised by dispatchers for various motor carriers. Motion pictures taken by Richardson on August 9th, proffered for the record, show trucks of major motor carriers approaching Respondent Union's picket line outside the warehouse, turning around, and driving away. Richardson's credible testimony warrants a determination, further, that service organizations such as the telephone company, have, upon occasion, refused to honor requests to perform work at Sears' warehouse.

3. The Relationship Between Sears and Its Floor Covering Installers.

With matters in this posture, we confront the principal question litigated herein. General Counsel contends that Respondent Union's picket lines—with relation to Sears' premises specifically—violated and continue to violate the statute, because they derive from a dispute with respect to which Sears must be considered a neutral secondary employer; this Board is solicited to conclude that Complainant herein, contrary to Respondent Union's contention, cannot realistically be considered the specific primary "employer" with whom respondent labor organization maintains its dispute.

(Concededly, Section 8(b)(4)(B) does not prohibit a labor organization's primary economic action—for

example, picketing—against business enterprises, in furtherance of labor disputes which it may have with them. See *Denver Building and Construction Trades Council*, 341 U. S. 675. The section does, however, proscribe conduct calculated to bring pressure upon some primary employer, *through other business enterprises generally described as so-called "secondary" employers*, for the purpose of furthering such disputes.)

When Respondent Union herein characterizes its dispute with Sears as primary, so the argument runs, such mere "labeling" does not, *ipso facto*, permit its escape from Section 8(b)(4)(B)'s thrust. As General Counsel notes: If floor covering installers within the Denver metropolitan area can be considered significantly free from Sears' control—during the course of their business dealings with that firm—then Respondent Union's quarrel must lie directly with those installers, not with Complainant herein; necessarily, therefore, Respondent Union's picketing of Sears, *calculated to further that quarrel*, must be considered subject to statutory proscription.

Thus, General Counsel contends, herein, that various floor covering installers, with whom this case is concerned, function freely without that degree of Sears' control which would make Complainant their "employer" within Section 8(b)(4)'s meaning. More particularly, General Counsel declares, within his brief, that:

> A clear preponderance of the evidence shows that the installers are independent contractors and not employees within the meaning of the Act, and, further, that there is insufficient control of the operations of the contractors by Sears to link the contractors to Sears in such a fashion that Sears may be called an "ally" of the contractors in their dispute with the Respondent [Union].

The contention presents this case's basic question. We must, therefore, proceed to consider both the nature and scope of Sears' challenged relationship with floor covering installers, herein. To that question, this decision now turns.

a. *The Installers.*

Joe and Eddie's Carpet Service is a partnership, consisting of Joe Brase and Eddie Stimac, previously noted; they have one employee, Charles Duran. Duke Massey does business as a sole proprietorship known as Duke's Floor Covering; Frank Harris, likewise, functions as a sole proprietor, under the Frank Harris Tile Company name. Paul Clark, also a sole proprietor, does business as Clark Carpet Service; he has functioned under various similar names for some ten years. Clark has two employees, currently.

These enterprises—all of them—do business from the homes of their owners, designated. All have, however, made substantial investments in their several businesses, through the purchase of one or more trucks and tools related to their trade.

> (Their trucks, so far as the record shows, carry no identification calculated to designate them as belonging either to Sears, or their registered owners. Sears does not tell its contract installers what type of trucks to purchase, nor does Complainant inspect them, or require that they be inspected.)

They all carry their own contractor's liability insurance. Consistently with relevant Colorado law—presumably—Joe and Eddie, particularly, do not maintain workmen's compensation coverage, or pay State unemployment insurance taxes, for themselves or their workmen. Joe and Eddie, however, pay social security taxes for their partnership employee, and withhold State and Federal income taxes from his wages, which are paid from partnership funds.

(The employee, Charles Duran, is paid weekly; he receives an hourly rate, plus overtime pay when he works more than eight hours per day, together with a paid vacation and six paid holidays.)

Clark's two employees, likewise, receive an hourly wage. They are covered by the State workmen's compensation statute, but have no unemployment compensation coverage. Taxes and social security payments are, likewise, withheld from their paychecks. Neither installers, nor their workmen, wear any kind of Sears, or other, uniform. All maintain their own business bank accounts. Sears has never checked—nor does it reserve the right to check—their books and records. So far as the record shows, Sears has never provided installation training. Nor has Complainant ever loaned these floor covering installers money for the purpose of starting their several businesses, maintaining such businesses, purchasing tools, or supplementing their working capital.

b. *Their Relationship With Sears Distinguished From That of Regular Sears Employees.*

Unlike regular Sears workers, installers are not required to take physical examinations before being engaged; nor must they submit to other personnel interviews, or mental or psychological testing, prior to performing services. They are engaged directly through Sears' warehouse installation department manager, or store managers, pursuant to contract, and not through Complainant's personnel department. Further, unlike Sears' regular employees, they receive none of the fringe benefits—such as profit sharing, purchase discounts, paid vacations, paid holidays, hospitalization and life insurance—which Complainant offers.

(Together with numerous other policy-favored persons and institutions—such as firemen, policemen, delivery

company workers, store doctors, churches, schools, and charitable institutions—installers may receive a 10% discount pass when making retail purchases, on a limited one-day basis, from store managers.)

They do not report at set times daily, for work. Finally, unlike Sears regular workers—whose relationship with Complainant is governed by the firm's personnel manual—the relationship between Sears and these floor covering installers is governed by contract, as previously noted.

Within these contracts, the signatory installers are designated "contractors" throughout. The contracts begin with a recitation that Complainant herein "does not install certain materials" which it sells, together with a recitation that customers purchasing such materials may "desire to arrange for installation thereof" by some qualified contractor.

(Floor covering installers currently utilized by Sears may be privy to contracts varying slightly both in format and language. Between February, 1965, and April, 1967, Complainant had contractors sign a contract form which was subsequently modified, during the latter month. The modifications, within my view, merit characterization as merely technical. Harris, Massey and Crown Carpet currently perform their services for Complainant pursuant to January, 1967, contracts, drafted and signed on Sears' earlier contract form. Joe and Eddie's Carpet service, though currently functioning pursuant to a contract signed during August, 1967, then executed Sears' prior contract draft. Paul Clark, whose contractual privity with Sears presumably dates from August 14, 1968, signed a revised form. Since the two forms, however, reveal no significant differences, references to contractual language herein—when considered necessary—will be confined to that found in Complainant's current contract form.)

The contractor represents his willingness and desire to perform installation work "but only as an independent contractor and not as an employee" with respect to Complainant herein. The contractor agrees to accept jobs "tendered" within a designated territory, which he can satisfactorily perform. Further, the Contractor engages that he will "perform each job in a neat and workmanlike manner" consistently with "established trade practices" within the area, relevant laws, rules, regulations, ordinances or other lawful requirements, and Sears' job specifications. Likewise:

> Contractor agrees that upon receiving a job for installation from Sears, Contractor shall first determine whether the installation can be satisfactorily completed. If Contractor determines that he cannot complete the job satisfactorily, Contractor will notify Sears promptly and thereupon the tender of the job shall be deemed to be withdrawn from Contractor.

Installers guarantee that every job shall be free from defects in workmanship, for a period of one year from its completion. If defects in workmanship nevertheless appear, the installers contract to remedy such defects promptly; should they fail to do so, Sears or the customer is given the right to have the defects corrected at the installer's expense. Sears is given the right to hold and use any monies then or thereafter due the Contractor as reimbursement for any sums so paid. The contract, *inter alia*, mentions a so-called Schedule of Contractor's Charges calculated to fix Contractor's installation charges; Sears agrees that Contractors will be paid "on behalf of each of Sears customers" whatever installation charge may be specified within the Contractor's work order, (1) upon receipt of the Contractor's invoice following the job's completion, (2) following the Contractor's execution of certain necessary documents; and (3) upon Sears' concur-

rence that the job has been "satisfactorily and properly" completed. In that connection:

> The parties further agree that Contractor has the full right to determine, and the responsibility for, the method, manner and control of the work to be performed as specified in the written Proposal or the General Order to the Contractor, and Contractor will employ sufficient competent adult workmen to complete each job promptly and satisfactorily.

The Contractor is granted the sole and exclusive right to hire, direct, supervise and discharge any workmen he may employ, subject only to Sears' right "as agent for [the] customer" to request such a workman's withdrawal should any customer report himself not satisfied with the workmanship or progress of any job. The Contractor assumes full responsibility for all contributions, taxes and assessments on payrolls pursuant to applicable federal, state and local laws; he further agrees to protect, defend, hold harmless and indemnify Sears, together with its agents and employees, from and against claims, demands, actions, liabilities, losses and expenses suffered by any person, which arise from or may be considered in any way related to the Contractor's activities, work or services. The contract is negotiated for one year, subject to annual renewal thereafter. Both Sears and the Contractor, however, have rights of termination, during the contract's term or extended term, upon at least thirty days prior written notice.

c. *How Installers Receive Their Work.*

When a sale is consummated, the salesman's "Floor Covering Estimate and Proposal" does not state the date installation will take place. When necessary materials are received at Complainant's store or warehouse, however, some Sears employee (whether it be someone in the designated warehouse office, or someone within the concerned

store's customer service department) communicates with the customer to arrange a convenient installation date. This being done, two copies of the firm's Estimate and Proposal, which the installer designated to do the work must receive, are put in boxes or pigeonholes, from which he may subsequently procure them.

The installer, when he comes to Sears, proceeds to his box, picks up the documents noted—which constitute his so-called "work order" for the job—procures the materials required, and goes on his way, presumably to perform whatever work may have been tendered.

Credible testimony proffered by various installers—without contradiction—reveals some variant practices in this connection. Sears has established no fixed reporting requirements; floor covering installers are not *required* to report at specific times, or even at all. Thus—with respect to Joe and Eddie's Carpet Service particularly—the record reveals: That the partners generally visit Sears' Westland Store daily, Mondays excepted; that, sometimes, they may perform work for other customers first, and then visit Complainant's store; that they do not, therefore, report at particular times; that they normally work about eight hours per day; that they do not themselves, receive overtime compensation from Sears or other customers should they work more than eight hours; but that they pay their own workman overtime. And Massey's comparable testimony—which stands without contradiction—warrants determinations: That he tries to pick up all of his assignments on Monday, for the coming week; that he normally works, thereafter, about thirty hours per week (on *all* his work), making some $10 per hour; that, when he does perform Sears' work, he normally stops to pick up his required materials between 8:30 and 9:00 o'clock, drinks coffee until 9:30 or 10:00 o'clock, then goes to work; that

there are days when he performs Sears' work on which he has no contract with persons at Sears' premises.

(None of the floor covering installers punch a time-clock. So far as the record shows, should one not wish to work, he flouts no duty.)

Harris, so he testified, works for Sears between 25-30 hours per week; he averages $60 per day for each day's work. He does not feel required to visit Sears daily; when he does so, he usually reaches the warehouse at 9:30 a.m. approximately.

When they do report, the floor covering installers—as previously noted—pick up their work folders, and then procure the materials required for their installations. Such materials are procured directly, either at Sears' store dock or warehouse; the Complainant does not deliver floor covering, neither to the customer's jobsite or residence, nor to contractors. With respect to floor covering materials pickups, further, the record shows that Joe and Eddie locate, pick up and load their own materials at Sears' dock. They will sometimes pick up several days' work at one time; materials thus procured may be stored in their garages, or left on their truck. They have left Sears' material in their garages, sometimes, for a couple of weeks.

(When supplied by Sears, neither hard surface materials nor carpet materials are pre-cut or pre-sewn in any fashion. Carpet materials are received by these installation contractors in rolls which approximate the correct square yardage required for the particular job. All cutting and sewing is done within the customer's home.)

Sears does not supply any material to carpet layers save the carpet and pad materials which Complainant sells. When linoleum or tile is sold, Sears likewise sells the paste

and metal fixtures required for installation; the hard surface material layer, however, supplies any required underlayment or base.

Sears' job tenders do not take into account such factors as where the material layers live; assignments are made on the basis of the installer's availability.

In that connection, further, the record shows that Joe and Eddie's Carpet Service does not work for Sears on Mondays; they work a Tuesday through Friday week. Comparably, Massey only works three days per week for Sears, since he works for another major customer, J. C. Penney's, the other two days.

> (All Sears' floor covering contractors mentioned in the present record have other customers within the Denver metropolitan area. Their charges may vary, as between customers, depending on their work. They can and do schedule significant amounts of work for their other customers on the same days they do Sears' work. When this is done, they may handle their several jobs in any order they choose, and need not perform Sears' work first. However, should a Sears' customer be promised some particular time of day for his work, the installers will *try* to meet that commitment.)

Normally, the person or department responsible for Sears' job tenders—with regard to floor covering installation work—takes into account whatever work load limitations particular installers may have set. Stating the matter otherwise, these installers are tendered jobs, daily, which will not exceed their own, previously stated, limitations. Thus, Joe and Eddie's Carpet Service, normally will be given jobs which require them to lay no more than roughly 100-150 yards per day. Massey and Harris—within the field of hard surface floor coverings—do about $60 worth of work per day; this normally represents about five-six

hours of work. Joe and Eddie have, sometimes, further limited the amount of work which they will perform on a given day by telling the Sears' representative responsible for assignments to schedule only so much, or not to schedule any more jobs for that day than she already has. Sears —as far as the record shows—complies. Additionally, Joe and Eddie may determine, themselves, which of them will perform particular jobs tendered.

d. *How the Work Is Performed.*

When floor covering materials have been procured, the contractor concerned may proceed to the customer's home, or call the customer to arrange a time which is convenient for him. He may likewise take the material home and leave it there, until he is ready to perform the work. Sears does not tell installers what customer to visit first, how early to arrive, or how late to stay; nor are directions given as to how the customer's home may be reached. The record shows—in this connection—that Joe and Eddie may, sometimes call Sears' customers and reschedule work with them, without notice to Complainant's store or warehouse. Likewise, they may make independent arrangements to come back to a customer's house the following day, should they be unable to reach a job or complete a job within a single day—all of this without notice to Sears' customer service or installation departments.

Massey, seemingly, follows a different procedure. Whenever he cannot reach a particular Sears' customer's job, he will call Sears and advise them, directly, regarding the job's postponement.

Installers receive no directions from Sears with regard to how floor coverings should be installed. They receive nothing more, with regard to particular jobs, than the salesman's rough drawn delineation of the specific room or living area within the customer's home to be covered.

(The salesman's prepared Estimate and Proposal form may or may not have such a diagram. In any event, whatever diagram there may be is not drawn to scale. Rather than a specific direction to installers, with regard to how floor covering should be laid, it seemingly does little more than help the salesman in consummating the sale.)

Sometimes, with respect to carpet installations, the diagram will show where seams are to be located; carpet layers, however, are not required to follow the drawing. They often ignore it, and put seams elsewhere, when, within their judgment, that would make for a better job. They may also modify the specified job in various other respects. When this is done—so far as Joe and Eddie is concerned—no notice is given Complainant herein, nor is prior clearance requested.

Though the contracts between Sears and various floor covering craftsmen require the latter to refrain from doing extra work for Sears' customers—such as taking up old carpet and relaying it within another room—without written authorization, the practice of most installers is clearly contrary. Joe Brase testified regarding two such instances, for which the customer paid directly; his testimony was corroborated, generally, by his partner.

(Massey, when queried in this connection, testified that he tells the customer to call a Sears salesman, because the customer is usually looking for a cut rate.)

Harris, so his testimony shows, does such extra work occasionally; sometimes he even sells the customer material for such extra work from his own stock. Paul Clark—though he has only worked for Sears since August 1968, has performed work for Sears customers, beyond that specified on Sears' job proposal, three times. Sears, so far as the record shows, gets no notice, and takes no reprisals in such situations; nor has it promulgated a flat prohibition.

Upon occasion, when busy, Joe and Eddie's Carpet Service has subcontracted Sears work to another person; this, without Sears' prior knowledge. That person has been paid with partnership funds. Harris, likewise, has had Massey perform Sears' work when he has been unable to do so. Complainant, on this occasion, likewise received no notice; Harris sent in the bill, and thereafter paid Massey himself. Harris has, likewise, negotiated directly with a Sears' customer for installation work, when the customer had made no arrangements with Sears, when his material was purchased, for such work.

Floor covering installers are responsible for repairing—without further charge—any of their work which may prove defective; likewise, they are responsible for any damage they may do. Should they be notified regarding a customer's complaint with respect to their work, however, they may normally schedule the required repairs at their convenience.

(Sears' current contract form grants the firm the right to condition payment of the contractor's installation charge "upon inspection by and approval of Sears that the job has been satisfactorily and properly completed" consistently with the salesman's Estimate and Proposal form. So far as the record shows, however, Sears' right of inspection is seldom exercised. Whether a complaint requires inspection will be determined as a matter of business judgment. Defective work, normally, will be brought to the craftsman's attention through customer complaints, which may be made either through Sears, which relays them, or directly.)

Massey, so his testimony shows, tries to get any necessary repair work done within a couple of weeks; Joe and Eddie's Carpet Service try to get theirs done sooner. Should installers be called upon to perform repairs on someone

else's work, or to replace defective materials, they charge their regular prices. For such supplementary work, however, prices are not pre-determined. Massey, so his testimony shows, charges prices which he, himself, fixes for repair or replacement jobs; he has never had a bill rejected under such circumstances.

Floor covering installers have the contractual right to reject any work which Sears has tendered; they have, upon numerous occasions, exercised that right following their first visit to the prospective customer's home. Such rejections may derive from various considerations; these may compass the craftsman's belief that the job cannot be performed properly as described within the firm's Estimate and Proposal form, or his belief that he cannot make money on the job. Thus, for example: Joe Brase testified—with general corroboration—that he refused a particular job in May, 1968, because he did not feel that the way the customer and the Sears' salesmen wanted the job performed was the proper way. His testimony shows that he left the job, and that he returned only after the customer had called Sears and concurred with Brase's recommendation regarding the way the work should be done. Clark—so the record shows—has rejected Sears' work twice since August 14, 1968. Massey, likewise testified that he had rejected work several times. Stimac's testimony reveals a rejection, with respect to part of a proffered job, because he did not believe he could do a good job, consistently with Sears' specifications.

e. *How Installers Are Paid.*

When Sears has—within the recent past—undertaken to establish a working relationship with some particular floor covering installer, Complainant's warehouse installation department manager, or some appropriate person within Sears' Denver managerial hierarchy, has negotiated

with that "contractor" regarding a so-called price list which details the prices to be charged and paid for installation work. General Counsel, within his brief, notes—correctly—that, within the present record, there was much divergent testimony concerning the precise way various prices *charged to Sears* by different installers originated. However, that testimony—within my view—need not be recapitulated in detail. By way of summary, I find merit in General Counsel's comment, within his brief, with respect thereto:

> The critical thread which runs throughout the testimony of those involved in the determination of the price lists is this—the greater portion of the prices currently in effect were proposed and initiated by the installers. Further, in those situations where prices were initiated by Sears, the installers involved engaged in meaningful negotiation as to the prices.

For example, Paul Clark's testimony shows that he initiated his first contract with Sears, seeking installation work. Clark, when he discussed the possibility of procuring installation work with Chandler, Sears' warehouse installation department manager, proposed or "bid" certain prices for various types of work which were acceptable to the latter. The prospective contractor, likewise told Chandler that he felt his proposed prices would subsequently have to be revised upward; Chandler, so I find, concurred.

Massey and Harris, so the record shows, together presented a revised price list, sometime early during 1968; they sought Chandler's concurrence regarding a proposed increase in the various rates which they were being paid. Their testimony, regarding the precise form of the list which they presented, was contradictory. However, my record review has persuaded me that—regardless of the form which their proposal may have taken—these hard surface floor covering craftsmen themselves initiated the sug-

gestions which Chandler subsequently accepted, save for certain fixture moving charges.

Testimony which Division Manager McNally, Brase and Stimac proffered, likewise, supports such a determination, relative to their negotiations. I find that Brase and Stimac, too, were initiators with respect to prices.

With respect to certain recent 1967 negotiations between the Crown Carpet Company, and another carpet laying contractor with whom Sears no longer deals, on the one hand, and Sears, Area Group Manager Donald Jansen, on the other, the record does show that Jansen, rather than the designated installers, was responsible for broaching discussions looking toward a change to *lower* base "per square yard" prices. However, the craftsmen—so I find—presented a written counter-proposal, nevertheless, for further price modifications calculated to cover "special" contingencies, which, within their view, would more precisely and equitably reflect the complexity of some of the work which they were doing; with respect to these installer proposals, as well as Sears' lower base price proposal, consensus was finally reached.

The price lists drafted, pursuant to these negotiations, consistently set different rates of installers' compensation (Sears' cost) for various types of work—which may present varying degrees of difficulty and require varying degrees of skill.

> (The record, further, warrants a determination that—despite these negotiated prices—situations may still develop with respect to which new negotiations are required, because previously set price lists may not cover some specific contingency or because the installers may *refuse* to perform work, judged to be more complex and difficult, for previously negotiated prices.)

These price lists provide the basis for those installation charges which may be noted on Sears' Floor Covering Estimate and Proposal forms; store salesmen compute their customers' installation charges from price lists which, in turn, derive from the prices which installers charge the Complainant herein. When Sears' customer service representatives or warehouse installation department personnel can readily compute—from their salesman's Estimate and Proposal form—what the installation contractor's charge should or will be, that figure will be calculated, and proper notations will be made, wherever necessary, within the proper spaces on the contractor's job documents. Should the designated Sears' representative be unable to determine a proper contractor's charge, these documents will be forwarded within Complainant's job folder with no stated charge shown.

> (While the contractor's total charge has generally been entered on the work orders given the linoleum and tile layers, through Sears' warehouse, the space for such notations has frequently been left blank on those issued Joe and Eddie by Sears' Westland store.)

The record, however, clearly warrants a determination that the total contractor's price noted by Sears does not bind the floor covering installers concerned. These "contractors" are the final judges with respect to their own final charges. Those who testified, herein, declared—consistently—that they have changed Sears' total price notation whenever it did not, for any reason, correctly reflect the work performed. Division Manager McNally of Sears' Westland store conceded that Joe and Eddie have done this many times, with or without explanations.

When a job is completed and the particular craftsman concerned desires to be paid, he sends Complainant herein —wherever he originally picked up his work documents—

the proper copy of Sears' Estimate and Proposal form previously received (No. 4 copy), together with a Sears originated invoice form.

(These documents may be turned in whenever the installer finishes his job; they may, however, be retained and accumulated before submission, for a week, or as long as the installer desires.)

If Sears' Proposal form (No. 2 copy) did not contain a notation stating the contractor's charge, he will make the necessary entry, based on his previously negotiated price list. Whenever he has performed extra work, directly related to whatever specific installations may have been directed, he may *add* charges for such work to the total sum which Sears' representative may previously have entered; whenever the total charge computed by the Sears' representative has been misfigured, the contractor may note a *correction*. Such changes are, generally, made without Sears' authorization, though the contractor may have given Complainant notice of his intention to make a change, where large sums are concerned. In all three situations, Sears regularly changes its records, and pays the installer whatever sum he claims is owed, for the job or jobs covered. So far as the record shows, no bill ever submitted for a job or jobs, with respect to which the prices were first computed or recomputed by the contractor, has ever been rejected.

When paying floor covering installers, Sears withholds no sums to cover Social Security or Federal Income taxes; nor is there any percentage withheld to cover possible installation mistakes.

C. *Conclusions.*

1. The Installers are Independent Contractors.

The legal standard pursuant to which a determination must be made as to whether the floor covering installers, herein, must be considered independent contractors or employees involves the so-called "right to control" test. Cf. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93. The test has been declared relevant and proper, with judicial concurrence; it has been utilized many times. See, *e.g. Pure Seal Dairy Company*, 135 NLRB 76, 79. Within the case last cited, the Board formulated this legal standard as follows:

> In determining the status of persons alleged to be independent contractors, the Act requires the application of the "right to control" test. Where the person for whom the services are performed retains the right to control *the manner and means* by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to *the result sought*, the relationship is that of independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative. (Emphasis supplied.)

When the facts of the present case are reviewed, with reference to this legal standard, their clear preponderance shows—within my view—that Sears does *not* retain the right to control *the manner and means* by which floor coverings which it sells will be installed. Rather, control is reserved *merely* with respect to the *result* sought. The floor covering craftsmen concerned herein, therefore, must be considered independent contractors. The Board's previously noted *Carpet Center* decision—which confirmed a Trial Examiner's determination, finding carpet installa-

tion workers to be employees of the respondent company therein designated—specified some six facets of the particular company-installer relationship, therein found, which the Trial Examiner and Board considered determinative. No more than one of these listed, however, can be considered characteristic of the company-installer relationship which this record reveals.

> (The Trial Examiner's *Carpet Center* decision refers to the fact that respondent company therein, should it find the work of particular installers displeasing in any respect, may discipline or get rid of them by withholding future assignments. Sears, with its installation contracts, likewise maintains such a right. I would consider the designated right consistent with either an "independent contractor" or "employee" determination.)

Within the Trial Examiner's decision noted, some ten further characteristics which mark *Carpet Center's* relationship with its carpet installation workers are mentioned. Practically none of these, however, can be considered descriptive of Sears' relationship with the floor covering contractors which are herein concerned.

> (First, the Trial Examiner's *Carpet Center* decision, among other things, notes that the manager of respondent company therein, when he assigns work to particular installers, takes into account both the number of yards to be laid, and where the installers live, trying to give them work near their homes. Sears' job tenders, directed to particular carpet layers, likewise, take into account the total number of yards to be laid. The present record, however, shows that those job assignment limitations which Sears will recognize derive from directives which the concerned installers have themselves laid down, rather than from Com-

plainant's departmental policies. Further, Sears' job tenders are proffered without regard for the particular contractor's geographical convenience. Secondly, while Sears' contractors—like *Carpet Center's* workmen—are themselves required to load materials they may need for various jobs, this record warrants no determination that they are normally permitted or required to search for such materials, personally, within Sears' warehouse or departmental storage facilities. Thirdly, contractors are presumably requested or required—like *Carpet Center's* workmen—to give Sears notice, whenever they will be unavailable for work because of vacations, sickness, or for some other reasons; nothing in the present record, however, warrants a determination that Sears maintains a definitive rule or regulation, regarding the time limits before which such prior notice must be given. There is some record suggestion that such notices may, sometimes, not be given.)

Within his decision, the Board's *Carpet Center* Trial Examiner found—with respect to that firm's installation craftsmen—that "certain aspects of their relationship with the company" would, despite his contrary conclusion, tend to support a possible independent contractor determination. My reading of the decision noted reveals some five "aspects" characteristic of the relationship therein considered which might, arguably, have suggested such a conclusion. The present record, *inter alia*, reveals these selfsame five "aspects" likewise operative herein, coupled with others, when we consider the nature and scope of Sears' relationship with its various Denver floor covering installation contractors.

Such considerations, within my view, clearly require a determination—contrary to Respondent Union's suggestion

herein—that *Carpet Center* presents a situation factually distinguishable, from that which the present record reveals, regarding the nature of the relationship which Respondent Union herein, through its challenged course of conduct, presumably sought to modify.

This Board has previously declared that its resolution of so-called "independent contractor" questions, through what has been designated the "right to control" test, will depend upon the facts of each case, with no single factor considered determinative. The trier of fact, therefore, finds no necessity, herein, presently to recapitulate, *seriatim*, those several factors marking Sears' relationship with various floor covering installation contractors which dictate its final characterization as one falling within the statutory "doing business" concept. Rather, I find it sufficient to declare, broadly that, their relationship—*when considered in totality as detailed within the present record*—merits a characterization consistent with General Counsel's contention herein.

(Previously, within this decision, passing references have been made to certain partially contradictory testimony proffered by General Counsel's witnesses, regarding the precise format of their suggested price list for linoleum and tile installation work, when they presented that list to Sears' warehouse installation department manager for negotiation. The first witness, Massey, testified that Chandler had been presented with proposals regarding the compensation which *Harris and he* wished to *receive* for various types of work related to linoleum and tile laying. Thereafter, Harris testified—differently—that Chandler was given proposals regarding the sums which Sears' *customers* should be *charged* for various tasks connected with linoleum and tile installation work; this proposal, so

Harris declared, was drafted because of their presumption that Sears would, finally, determine *their compensation* by applying a predetermined percentage figure to whatever sums Complainant's customers may have been *charged* for installation services. While testifying, Harris produced a purported copy of the document which Chandler had been given; that document supports his recollection, since it shows proposed "selling" prices for installation work done in connection with Sears' linoleum and tile sales. With matters in this posture, Harris' testimony regarding the proposal's format—which Chandler substantially corroborated—merits credence. Having reached this conclusion, however, I reject Respondent Union's presumptively consequent contention that such a proposal, dealing with Sears' *selling* prices, suggests a consensus—shared by Chandler on the one hand, and both hard surface contractors on the other—that their price list negotiations were really *employer-employee* discussions. I note, in this connection, that the proposed price list—despite its form—was initiated by these installers; both were seeking higher compensation. Further, I note that Chandler's final response—with respect to which both Massey and Harris later concurred—was prepared to show Sears' linoleum and tile work *costs;* rather than Sears' proposed *customer charges*, it listed the specific sums which *Massey and Harris* would, thereafter, *receive*. And in any event, whether or not my conclusion is considered sound, these Chandler-Massey-Harris negotiations, within my view, possess no compelling or crucial significance. When considered in perspective, *within the context which the complete record provides*, such negotiations can hardly be considered, themselves, sufficiently substantial or significant to warrant a rejection of General Counsel's position.)

Counsel for Respondent Union did, finally, produce a document culled from Sears' file wherein Complainant's various contractors were, substantially, directed to procure some designated insurance coverage, some sort of Federal Account number, and to have their contract notarized. Chandler's decision to promulgate these directives, however cannot—with due regard for the whole record—be considered sufficient to dictate a conclusion that he was addressing employees, or to vitiate my determination that Sears' floor covering installers held "independent contractor" status.

These installers, then, must be considered independent businessmen. And since Sears' concern, with respect to their work, is limited merely to such work's final result, Complainant's business relationship with them cannot be considered sufficiently close to destroy its neutrality. Complainant's counsel, within his brief, suggests—in this connection—that:—

> It is important in analyzing this record to understand that the installation of floor covering is not an integrated part of our business and in arranging for the installation Sears has not delegated the function normally performed, nor ever performed, by regular Sears employees; the customer is expressly told that Sears will not do the installation . . . In our situation the fact that Sears will find an installer for the customer is merely an aid in selling the merchandise; Sears has not replaced an integrated employee operation with an outside contractor.

These factual contentions, within my view, have record support; I concur. Further, nothing within the record would warrant a determination that Sears claims any power or right to determine labor relations policy for or with these floor covering installation contractors. Necessarily, therefore, Respondent Union's grievance could only be resolved

by them, not by Complainant herein; I so find. Under no circumstances can these floor covering firms be considered "allies" with respect to Sears, concerning a dispute which the latter firm could resolve. Nor can the reverse be considered true. Respondent Union's contrary contention must be rejected.

2. Respondent Union's Conduct Violates the Statute.

Once a determination has been made that the various carpet, linoleum and tile layers whom Sears utilized for floor covering installation work must be considered independent contractors, there can be no doubt that Respondent Union herein—determined to procure a settlement of differences with Joe and Eddie's Carpet Service particularly—relied upon statutorily proscribed means to pursue objectives statutorily forbidden. I so find. Regarding this portion of General Counsel's case, Complainant's counsel, within his brief, notes:

> . . . that the Respondent attempted to make [Joe Brase, Eddie Stimac and Charles Duran] become members; that they refused to join; that upon their refusal to join they were picketed; that, when the picketing failed to have any effect, the Respondent began and continued to picket Sears. The object of the picketing at Sears can be and is only to force Sears to stop doing business with the installers until they join the Union.

This trier of fact finds counsel's statement both factually correct, and legally persuasive. The Supreme Court has clearly held that peaceful picketing—comparable with Respondent Union's picketing with which this case is concerned—constitutes "inducement" and "encouragement" statutorily proscribed. *N. L. R. B. v. Electrical Workers*, 341 U. S. 694, 701-702. Such a conclusion with respect to this case may be—indeed must be—considered warranted even though Respondent Union's picket lines, on some oc-

casions, may not have been successful. *N. L. R. B.* v. *Denver Building Trades Council*, 193 F. 2d 421 (C. A. 10). Respondent Union's pickets have, however, had a discernible effect. True, the record may show nothing reliable or probative regarding their success, or lack of success, when they picketed Joe and Eddie's Carpet Service, specifically—nor may it show persuasively what success, if any, Respondent Union had when it picketed Sears' Cherry Creek store. With respect to Sears' warehouse, however, Respondent Union's picket line clearly brought results. Deliveries were delayed, or were not made. Such a record showing warrants a determination that Respondent Union's picket line was—despite the mild language found on its picket signs—reasonably calculated to induce or encourage individuals, employed by persons or business enterprises engaged in commerce, to refuse, in the course of their employment to transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services. I so find. Further, Respondent Union's picket line—to the extent that it was succesful—effectively threatened, coerced and restrained Sears directly.

Respondent Union's proscribed object, likewise, must be considered manifest. The Union's original purpose was shown when Joe and Eddie's Carpet Service was picketed, while the partners and their workman were performing work within a customer's home. When such picketing produced no tangible result, Respondent Union commenced its picketing of Complainant herein. As General Counsel notes—within his brief—the only conclusion which can properly be drawn when a labor organization pickets a commercial firm "doing business" with some independent contractor, with whom that labor organization has a dispute, must be the conclusion that at least "an" object of respondent labor organization's picket line is the forced cessation of that business relationship. I so find.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent Union and its designated representatives, set forth in Section III above—since they occurred in connection with the business operations of Complainant herein previously noted—have had a close, intimate, and substantial relation to trade, traffic, and commerce among the several States. Absent correction they would tend to lead, and in this instance have led, to labor disputes burdening and obstructing commerce, and the free flow of commerce.

V. The Remedy.

Since it has been found that Respondent Union and its representatives did engage, and continue to engage, in certain unfair labor practices, it will be recommended that they cease and desist therefrom, and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Conclusions of Law.

In the light of these findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. Sears, Roebuck and Co. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Joe Brase and Eddie Stimac, d/b/a Joe and Eddie's Carpet Service Company; Crown Carpet, Inc.; Paul E. Clark, d/b/a Clark Carpet Service; Frank Harris, d/b/a Frank Harris Tile Company; Daryl Massey, d/b/a Duke's Floor Covering; Joseph Mozzicato; John Erpelding, d/b/a Sea-Ro Tile Company; and Gerald Fallert, d/b/a G. & H.

Tile Company, are persons engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act, as amended.

3. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

4. By inducing and encouraging individuals employed by Sears, or by other persons engaged in commerce or in an industry affecting commerce, to refuse, in the course of their employment, to transport or otherwise handle or work on goods, materials, articles or other commodities, or to perform services—for the purpose of forcing or requiring Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with, Joe and Eddie's Carpet Service, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, and G. & H. Tile Company—Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(i)(B) of the Act, as amended.

5. By threats, coercion or restraint, directed both to Sears, Roebuck and Co. and other persons engaged in commerce or in an industry affecting commerce—for the purpose of forcing or requiring such persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer processor, or manufacturer, and to cease doing business with other persons—the Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(ii)(B) of the Act, as amended.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

Recommended Order.

Upon these findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that respondent labor organization, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, together with its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducement or encouragement of any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require Sears, Roebuck and Co., or any other person, to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, G. & H. Tile Company, or any other person;

(b) Threatening, coercing or restraining Sears, Roebuck and Co., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Sears, or any other person, to cease doing business with the partnership and several sole proprietorships designated within the preceding subparagraph.

2. Take the following affirmative action which will effectuate the policies of the Act, as amended.

(a) Post in conspicuous places at its business offices and meeting halls, including all places where notices to

members are customarily posted, copies of the notice attached to this report as an appendix.[1] Copies of this notice, to be furnished by the Regional Director for Region 27, as the Board's agent, shall be posted immediately upon their receipt, after being duly signed on behalf of respondent labor organization by its duly designated representative. Once posted, it shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by respondent labor organization to insure that this notice is not altered, defaced, or covered by any other material;

(b) Sign and mail sufficient copies of this said notice to the Regional Director for Region 27 for posting by Sears Roebuck and Co., this recipient being willing, at all locations where notices to employees and installation contractors are customarily posted;

(c) File with the Regional Director of Region 27, as the Board's agent, within 20 days of the service of this decision, a written statement setting forth the manner and form in which it has complied with these recommendations.[2]

Dated:

/s/ Maurice M. Miller,
Trial Examiner.

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1. In the event that this Recommended Order is adopted by the Board, the words "A Decison and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

2. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 27, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX.

NOTICE.

To All Members of Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO.

PURSUANT TO

The Recommended Order of a Trial Examiner of the NATIONAL LABOR RELATIONS BOARD and in order to effectuate the policies of the NATIONAL LABOR RELATIONS ACT (As Amended)

we hereby notify you that:

WE WILL NOT induce or encourage anyone employed by Sears, Roebuck and Co., or by any other person engaged in commerce—or in an industry which affects commerce—to engage in a strike or refusal—in the course of his employment—to use, manufacture, process transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services—for the purpose of forcing or requiring Sears Roebuck and Co., or any other person, to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, G. & H. Tile Company, or any other person.

WE WILL NOT threaten, coerce or restrain Sears, Roebuck and Co., or any other person engaged in commerce—or in an industry which affects commerce—by maintaining picket lines, or by any other means—for

the purpose of forcing or requiring Sears, Roebuck and Co., or any other person, to cease doing business with the partnerships and sole proprietorships named in the paragraph above.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 260 New Custom House, 721—19th Street, Denver, Colorado, 80202, Telephone No. 297-3551.

APPENDIX E.

STATUTE INVOLVED.

National Labor Relations Act
(61 Stat. 136, 29 U. S. C. § 151, et seq.)

Sec. 8(b)(4)(B); (29 U. S. C. § 158(b)(4)(B)):

"It shall be an unfair labor practice for a labor organization or its agents. . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *"

SEC. 10(e), (f), (g), (h), (j) and (l); (29 U. S. C. § 160(e), (f), (g), (h), (j) and (l)):

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if sup-

ported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court, as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless spe-

cifically ordered by the court, operate as a stay of the Board's order.

(h) When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (1) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia)

within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(4) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

APPENDIX F.

UNITED STATES DISTRICT COURT

For the District of Colorado.

(Filed United States District Court, Denver, Colorado, Aug. 29, 1968. G. Walter Bowman, Clerk.)

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *vs.* CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, *Respondent.*	Civil No. C-1052.

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To: *The Honorable, the Judges of the United States District Court for the District of Colorado:*

COMES NOW Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l)

of the National Labor Relations Act, as amended, 61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 106(1) (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on charges alleging, *inter alia*, that Respondent has engaged in, and is engaging in acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(l) of the Act.

3. On or about August 9, 1968, Sears, Roebuck and Co. (herein called Sears), pursuant to the provisions of the Act, filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. Copies of said charge are attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the charge filed on August

9, 1968, alleging the Respondent violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, is true and that a complaint of the Board, based on said charge under Section 8(b)(4)(i) and (ii), subparagraph (B) of the Act should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, the Petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Section 2(5), 8(b), and 10(l) of the Act, and has engaged in and is engaging in acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Sections 2(2) (6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1125—15th Street, Denver, Colorado; and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of the Respondent.

(c) Sears, a New York corporation, is engaged at Denver, Colorado, as a retail department store. In the course and conduct of its business, Sears distributes and sells annually within the State of Colorado goods and other merchandise, having a gross value in excess of $500,000, of which more than $50,000 is transported directly to the State of Colorado from points outside that State.

(d) At all times material herein, Sears has maintained a retail department store at 2375 East 1st Avenue, Denver, Colorado, and has maintained a warehouse at 1701 West 6th Avenue, Denver, Colorado.

(e) Sears is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(f) Joe and Eddie's Carpet Service (herein called Joe and Eddie's), is a partnership engaged in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Joe and Eddie's regularly provide services to Sears, among others.

(g) Daryl Massey, an individual, d b a Duke's Floor Covering (herein called Duke's), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Duke's regularly provides services to Sears, among others.

(h) Joseph Mozzicato (herein called Mozzicato), an individual, is engaged in the business of installing floor coverings in Lakewood, Colorado. In the course and conduct of his business, Mozzicato regularly provides services to Sears, among others.

(i) Francis H. Harris, an individual, d b a Frank Harris Tile Company (herein called Harris), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Harris regularly provides services to Sears, among others.

(j) John Erpelding, an individual, d b a Sea Ro Tile (herein called Sea Ro), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Sea Ro regularly provides services to Sears, among others.

(k) Gerald Callert, an individual, d b a G & H Tile

(herein called G & H), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, G & H regularly provides services to Sears, among others.

(l) Paul E. Clark, an individual, d b a Clark Carpet Service (herein called Clark), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Clark regularly provides services to Sears, among others.

(la) Elmer Neff, Jr., an individual, d b a E & R Carpets (herein called E & R), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, E & R regularly provides services to Sears, among others.

(n) Since on or about July 15, 1968, Respondent has demanded that Joe and Eddie's recognize and bargain with it as the representative of the employees of Joe and Eddie's.

(o) At no time material herein has Respondent had any labor dispute with Sears.

(p) In furtherance of its demand referred to above in subparagraph (n), and for reasons unrelated to its relationship with Sears, on August 8, 1968, and since that date, Respondent did authorize, establish and maintain pickets at the premises of Sears at its warehouse at 1701 West 6th Avenue, Denver, Colorado, and on August 7, 1968, until August 9, 1968, Respondent did authorize, establish and maintain pickets at the premises of Sears at its retail store at 2375 East 1st Avenue, Denver, Colorado.

(q) By the acts and conduct set forth in subparagraph (n) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sears and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the

course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained, and coerced Sears and other persons engaged in commerce or in industries affecting commerce.

(r) An object of the acts and conduct engaged in by Respondent set forth in subparagraphs (p) and (q) above, was and is to force or require Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Joe and Eddie's, Duke's Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

6. It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (p), (q), and (r) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent,

its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sears, or at or in the vicinity of any other person engaged in commerce or in an industry affecting commerce doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conducts, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sears, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Sears or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea Ro, G & H, Clark, and E & R.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 29th day of August, 1968.

/s/ CLYDE F. WAERS,
Clyde F. Waers, Regional Director, Twenty-Seventh Region, National Labor Relations Board.
Room 260, New Custom House,
721—19th Street,
Denver, Colorado, 80202.

ARNOLD ORDMAN,
General Counsel.

DOMINICK L. MANOLI,
Associate General Counsel.

JULIUS G. SEROT,
Assistant General Counsel.

FRANCIS SPERANDEO,
Regional Attorney, Region 27.

/s/ RICHARD J. WISE,
Board Attorney.

National Labor Relations Board,
Twenty-Seventh Region,
Room 260 New Custom House,
721—19th Street—Denver, Colorado, 80202,
297-3551.

EXHIBIT 1.

Form NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Instructions: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write In This Space
Case No. 27-CC-278
Date Filed August 9, 1968

1. Labor Organization Or Its Agents Against Which Charge Is Brought
   a. Name
   Carpet and Linoleum Layers Union, Local 419
   b. Union Representative to Contract
   Mr. G. Cooney
   c. Phone No.
   244-4884
   d. Address Street, city, State and ZIP code)
   1129 15th Street, Denver, Colorado
   e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection (4) (i) (ii) (B) of the National

(List Subsections)

SUPREME COURT, U. S.

AUG 25 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*,

and

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF AMERICAN RETAIL FEDERATION TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

AND

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

SHERMAN, HILL & BISHOP
Suite 420
1819 H Street, N.W.
Washington, D.C.
Of Counsel

DAVID I. BISHOP
PHIL B. HAMMOND
Suite 420
1819 H Street, N.W.
Washington, D.C.
Attorneys for American Retail Federation as Amicus Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*,

and

CLYDE E. WEAKS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF AMERICAN RETAIL FEDERATION TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

Comes Now the American Retail Federation (hereinafter called "Federation"), by its attorneys, Brice L. Bishop and Phil B. Hammond, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae* supporting the position of the Petitioner, Sears, Roebuck and Co., and urging the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit for the following reasons:

1. The Federation is an organization composed of 78 national and state retail associations. The membership of these associations consists of 800,000 retailers with approximately six million employees working in small local stores to large national chains. The Federation's interest is based on the broad and far-reaching effect on retailers and other employers which will occur if the decision of the Court below is allowed to stand.

2. The Federation has appeared as *amicus curiae* before this Court in labor relations matters which have affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved: the appropriate standards for determining who is an independent contractor under the National Labor Relations Act[1]; the appropriateness of state courts granting injunctive relief in cases of shopping center picketing;[2] and the Board's lack of authority to compel employers to bargain based on Union authorization cards unless the conduct of a fair election is impossible.[3]

The unwarranted and prejudicial deprivation of rights of retailers and other employers in judicial proceedings for temporary injunctive relief from secondary boycotts is a matter of substantial concern to the members of the Federation. If the decision of

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[1] Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America*, 390 U.S. 254 (1968).

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc., and Weis Markets Inc.*, 391 U.S. 308 (1968).

[3] Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB*, — U.S. —, 23 L. Ed. 2d 547 (1969) and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.*, — U.S. —, 23 L. Ed. 2d 547.

the Tenth Circuit is allowed to stand, employers will not have access to any forum for relief since they are already denied access to state courts under pre-emption doctrines.

3. The Federation has had an opportunity to study the Petition for Writ of Certiorari filed by Sears, Roebuck on August 15, 1969. In addition to the cogent arguments made by Sears, the Federation will make further important arguments regarding the application of the legislative history to the question involved and will compare other Courts of Appeals cases which are in conflict with the decision of the court below.

The Federation further believes that its unique experience may be helpful to the Court in determining the great public importance of the issues raised by the denial to employers of valuable rights intended to be exercised as part of the statutory scheme of the National Labor Relations Act.

4. The effect upon retailers of the determination whether an aggrieved charging party may appeal the District Court's refusal to grant injunctive relief under Sec. 10(l) of the National Labor Relations Act when the Board's Regional Director is unwilling to do so, would be widespread and considerable as retailers have been involved in numerous litigated matters involving secondary picketing.[4]

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[4] See, e.g., the factual situations involved in *N.L.R.B.* v. *Local 25, I.B.E.W.*, 351 F. 2d 593 (2d Cir. 1965); *N.L.R.B.* v. *Building Service Employees*, 376 F. 2d 131 (1st Cir. 1967); *Local 140, Furniture Workers* v. *N.L.R.B.*, 390 F. 2d 495 (2nd Cir. 1968); *Honolulu Typographical Union* v. *N.L.R.B.*, 401 F. 2d 952 (D.C. Cir. 1968); *Hoffman* v. *Typographical Union Local 37*, 243 F. Supp. 970 (D.C. Hawaii 1965); *Squillacote* v. *Building Trades Council*, 266 F. Supp. 971 (E.D. Wisc. 1967); *Penello* v. *Drivers Local 639*, — F. Supp. —, 68 LRRM 2222 (D.C. 1968); *Roywood*

5. Counsel for Petitioner and the National Labor Relations Board consented to the Federation's filing an *amicus* brief. Copies of the letters of consent have been filed with the Clerk. By letter dated August 14, 1969, counsel for Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, refused to grant such consent.

6. Because it is reasonable to expect that retailers in the future will be subject as they have in the past to picketing proscribed by Sec. 10(l) of the Act, the effect of the Circuit Court's decision in the instant case will substantially deny to the Federation's members the full rights intended to be conferred upon charging parties. If permission is granted to file an *amicus* brief, the brief will be short and relevant so that the Court's time will not be misspent.

Respectfully submitted,

BRICE I. BISHOP
PHIL B. HAMMOND
Suite 420
1819 H Street N. W.
Washington, D. C.
Attorneys for American Retail Federation as Amicus Curiae

SHIMMEL, HILL & BISHOP
Suite 420
1819 H Street N. W.
Washington, D. C.
Of Counsel

Corp. v. *Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968); *Local 1238, Carpet, Linoleum & Soft Tile Layers*, 160 NLRB No. 39 (1966); *Columbus Building & Trade Council*, 164 NLRB No. 79 (1967); *Milk Wagon Drivers, Local 753*, 164 NLRB No. 116 (1967); *Teamsters, Local 294*, 173 NLRB No. 234 (1969).

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BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation"), is an organization composed of seventy-eight national and state retail associations. The membership of these associations

consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation has appeared as *amicus curiae* before this Court in labor relations matters which have affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved: the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriateness of state courts granting injunctive relief in cases of shopping center picketing;[2] and the Board's lack of authority to compel employers to bargain based on Union authorization cards unless the conduct of a fair election is impossible.[3]

The subject matter of the instant case—the unwarranted and prejudicial deprivation of rights of an employer in judicial proceedings for temporary injunctive relief from secondary boycotts—is a matter of substantial concern to the Federation.[4] In 1947

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[1] Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America*, 390 U.S. 254 (1968).

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc., and Weis Markets, Inc.*, 391 U.S. 308 (1968).

[3] Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB*, — U.S. —, 23 L. Ed. 2d 547 (1969) and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.*, — U.S. —, 23 L. Ed. 2d 547.

[4] The Federation has frequently called to the attention of Congress its views on the subject of secondary boycotts. E.g., *Hearings Before the Special Committee on Labor, Committee on Education*

and 1959, Congress sought to protect neutral bystanders from becoming embroiled in the labor disputes of others by enacting the Taft-Hartley and Landrum-Griffin amendments to the National Labor Relations Act. Notwithstanding this legislation, however, many unions continue to resort to unlawful secondary conduct to achieve their goals.[5] Retail establishments, in particular, have frequently fallen prey to such tactics.[6]

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and Labor, on H. R. 11725, House, 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on the Separation of Powers, Committee on the Judiciary, on Congressional Oversight of Administrative Agencies (NLRB),* Senate, 90th Cong., 2nd Sess. (1968). Similarly, the Federation has presented its position on other matters involving the administration of the Act to both Congress and this Court. E.g., *Hearings Before the Subcommittee on Labor, Committee on Labor and Public Welfare, on S. 256,* Senate, 89th Cong., 1st Sess. (1965); *Hearings Before the Subcommittee on Labor, Committee on Education and Labor, on H. R. 77, H. R. 4350 and Similar Bills,* House, 89th Cong., 1st Sess. (1965).

[5] Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges,* involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board,* p. 218 (1967); *Summary of Operations of NLRB General Counsel,* reprinted in 70 LRR 459 at 468 (1969). In the event that the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) of the Act to petition a United States District Court for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

[6] See, e.g., the factual situations involved in *N.L.R.B.* v. *Local 25, I.B.E.W.,* 351 F. 2d 593 (2d Cir. 1965); *N.L.R.B.* v. *Building Service Employees,* 376 F. 2d 131 (1st Cir. 1967); *Local 140, Furniture Workers* v. *N.L.R.B.,* 390 F. 2d 495 (2nd Cir. 1968); *Honolulu Typographical Union* v. *N.L.R.B.,* 401 F. 2d 952 (D.C. Cir. 1968); *Hoffman* v. *Typographical Union, Local 37,* 243 F. Supp. 790 (D.C. Hawaii 1965); *Squillacote* v. *Building Trades*

With the concomitant remedial limitations placed upon picketing arguably subject to relief under Section 10(l),[7] employers more than ever find that Section 10(l) affords the only remedy to proscribe peaceful picketing.[8]

This case raises, therefore, recurrent and important questions of first impression involving an area of vital interest to the retail industry and all employers. The injunctive protection afforded by Section 10(l) of the Act extends to secondary boycotts as well as unlawful union recognitional picketing and improper "hot-cargo" agreements.[9] A District Court ordered tem-

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Council, 266 F. Supp. 971 (E.D. Wisc. 1967); *Penello* v. *Drivers Local 639*, — F. Supp. —, 68 LRRM 2222 (D.C. 1968); *Roywood Corp.* v. *Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968); *Local 1238, Carpet, Linoleum & Soft Tile Layers*, 160 NLRB No. 39 (1966); *Columbus Building & Trade Council*, 164 NLRB No. 79 (1967); *Milk Wagon Drivers, Local 753*, 164 NLRB No. 116 (1967); *Teamsters, Local 294*, 173 NLRB No. 234 (1969).

[7] II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

[8] *Amalgamated Food Employees Union, Local 590*, v. *Logan Valley Plaza, Inc. and Weis Markets, Inc.*, 391 U.S. 308 (1968).

[9] The number of unfair labor practice charges alleging union recognitional picketing in violation of Section 8(b)(7) has been increasing substantially. Between NLRB fiscal years 1966 and 1967, for example, the number of such charges rose 39 percent. *Thirty-second Annual Report of the National Labor Relations Board, supra* at 218; *Thirty-first Annual Report of the National Labor Relations Board*, p. 186 (1966). As in the case of charges alleging unlawful secondary boycotts, if the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) to petition for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

porary injunction[10] is the only bulwark available to employers subjected to such unlawful union pressures.[11] A dilution of this protection, such as that which will be occasioned by the decision below, fosters the very industrial strife the Act was designed to prevent and may mean enforced capitulation by employers who are denied access to state courts under preemption doctrines and who have now been denied relief in the only forum left available to them.

Such a paradoxical result is also at odds with the constitutional requirements of fairness and pro-

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[10] Injunctive relief under Sec. 10(l) is designed to provide interim relief until the permanent injunction is obtained under Sec. 10(e) or (f). In the instant case, the Union has petitioned the Court of Appeals of the District of Columbia under Sec. 10(f), the Board has cross-filed under Sec. 10(e) and Sears has moved to intervene. (*Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO* v. *National Labor Relations Board*, C.A.D.C. No. 23223, filed July 3, 1969) If the decision of the 10th Circuit in the instant case is allowed to stand, a successful employer before the Board would be placed in the anomalous position of having participatory rights to obtain permanent injunctive relief under *Scofield* but yet denied the interim relief provided by Congress in Sec. 10(l) during the protracted course of the unremedied picketing.

[11] The protection afforded to an employer from unlawful picketing through a Board initiated action for a permanent injunction is more illusory than real. The length of time required for the Board to issue complaint, for the Board Trial Examiner and the Board itself to rule on the complaint and for a Court of Appeals then to enforce any resultant Board order largely negates the value to the picketed employer of such a proceeding. In the instant case, for example, the Union commenced its picketing of Sears on August 7, 1968 and the picketing still continued after the Board order of June 20, 1969. (See Motion for Injunction Pending Appeal, Record, page 11, et seq.) A petition in the Court of Appeals to review the Board's order finding that such picketing was unlawful was only recently filed and has not yet been briefed or argued.

cedural due process which permeate all valid Congressional enactments. And, finally, the decision below sharply conflicts with the expanding awareness of other courts to the essential rights of Board charging parties to participate in proceedings governing their essential interests.

REASONS FOR GRANTING THE WRIT

1. *The present case raises significant issues in the administration of the Act which should be resolved by the exercise of this Court's "general power to supervise the administration of justice in the federal courts."* *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260.

This Court has determined that "both the successful charged party (in Scofield) and the successful charging party (in Fafnir) have a right to intervene in the Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Automobile Workers* v. *Scofield*, 382 U.S. 205, 208. It has not, however, determined the corollary and equally-important extent to which charging parties either may participate in proceedings by the Board for temporary injunctive relief or may participate in subsequent appellate review of such proceedings. Left unanswered by the Court, therefore, are such significant issues as the rights of charging parties to participate as "parties" in such District Court proceedings;[12] to

[12] This question is presently pending before the Court of Appeals for the Third Circuit in *Samoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, Nos. 17,907 and 17,910, where the District Court, notwithstanding the express rights of participation accorded charging parties by Section (10(l), nevertheless ruled that the charging parties there involved did not constitute "parties" and, accordingly, lacked standing to object to a proffered Board stipulation.

obtain relief from the District Court when the Board chooses not to pursue its petition;[13] to prosecute an appeal from an adverse District Court decision when, as in the instant case, the Board declines to do so; to participate as a party or intervene in appellate proceedings before the Courts of Appeals;[14] or to file a petition for certiorari before this Court.[15] The instant

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[13] See *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (C.A. 9, 1965), in which case the Ninth Circuit affirmed the issuance of an injunction under Section 10(l), at the urging of the charging party and over the objection of the Board Regional Director, where the charging party "merely supported the original petition for injunctive relief requested by the Regional Director."

[14] The Ninth Circuit has declined to allow a *successful* charging party to intervene in an appeal from the granting of a 10(l) injunction *(San Francisco-Oakland Newspaper Guild* v. *Kennedy*, — F. 2d —, 69 LRRM 2535 (1969), *cert. den.* — U.S. —, 69 LRRM 2537 (1968)) while the Second and Sixth Circuit have, conversely, apparently permitted such intervention. *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (2nd Cir., 1966); *N.L.R.B.* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir., 1967).

[15] Only if the charging party is accorded the status of a "party" or "intervenor" in the Court of Appeals, as permitted by the decisions of the Second and Sixth Circuits noted in the preceding footnote, may he seek certiorari from an adverse decision of the Court of Appeals. *United Automobile Workers* v. *Scofield, supra* at 214. The importance of the right to petition for certiorari is underscored by this Court's decision in *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1963). In that case, the charged union, which had been cleared of a Section 8(b)(4) charge by the Board, was found by the Second Circuit to have violated the Act. The union, which had been allowed intervention in the Court of Appeals, sought and obtained certiorari when the Board declined to file such a petition. On the merits, this Court then unanimously reversed the Second Circuit. Had the charged party, or a charging party in the converse but analogous situation here involved, not been accorded intervention rights, there would have been no opportunity for this Court's remedial review.

case provides the Court with an appropriate vehicle to resolve these important and recurring questions.

2. *The decision below infringes on the right of charging parties to procedural fairness and due process.*

It is axiomatic that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967), quoting *Rusk* v. *Cort*, 369 U.S. 367, 380 (1962). As Mr. Justice Brandeis observed in *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (concurring opinion):

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."

The legislative history of Section 10(l), as well as its express language, reveals that Congress did not intend to preclude charging parties' access to judicial review. Section 10(l) was, in effect, a compromise between the House bill, as well as the Ball amendment in the Senate, which would have permitted private parties to direct the conduct of their own injunction proceedings[16] and the opposition to such proposals

[16] The House Bill provided for 10(l) injunctions at the instance of private parties rather than the Board, and the Ball amendment similarly permitted private parties "to control [their] own litigation . . . [rather than permit] some official of the Board . . . [to] decide whether in his discretion, rather than in the discretion of the man who claims to be injured, the litigation should be filed." *Legislative History of the Labor Management Relations Act*, 1947, pp. 561, 1353.

which would have precluded employers from independently choosing the forum, selecting the theories of violation and relief and actually initiating such suits.[17] The result was that Section 10(l) was intended to accommodate both "public" and "private" interests. Private parties were provided with both a meaningful remedy—injunctive relief—and a right of full participation once a mandatory injunction suit has been commenced before the Board. In addition, Section 10 (h) was enacted to exempt from the Norris-LaGuardia Act *all* federal court proceedings authorized by Section 10 of the Act, including both the review and enforcement proceedings involved in *Scofield* and the 10(l) proceedings here involved.[18]

The Congressional objective of full participation by a charging party, once the Board has initiated a 10(l) suit, sharply conflicts with foreclosing the access of charging parties to judicial review. It is no answer to such denial to argue that the right to appeal from an erroneous District Court decision is precluded because the statutory language only mentions the right "to appear by counsel and present any relevant testi-

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[17] See, e.g., *Legislative History of the Labor Management Relations Act*, 1947, pp. 1057-8, 1347-70.

[18] The decision below presupposes a conflict between the grant of appellate rights to a charging party and the prohibitions of the Norris-LaGuardia Act. But participation by the charging party in *Scofield*—where the scope of the injunctive relief was permanent rather than temporary as in a 10(l) proceeding and the risk of potential conflict, accordingly, all the more serious, did not conflict with the Norris-LaGuardia Act for the same reason that such participation in this case does not. Section 10(h), which removes *all* Section 10 proceedings from the limitations of the Norris-LaGuardia Act, uniformly applies to a 10(l) proceeding as well as to a 10(e) review proceeding.

mony."[19] The right to full participation in the initial stages of an adjudicatory proceeding necessarily implies the opportunity to invoke and participate in appellate judicial review.[20] This Court in *Scofield* recognized that the statutory design interblends public and private rights and that considerations of procedural fairness and due process, as well as Congressional intent, require that intervention rights be accorded to *successful* charging parties in Board enforcement proceedings. The same considerations also require that *unsuccessful* charging parties in 10(l) proceedings be granted similar rights, particularly where, unless accorded such rights, they will have no effective recourse available to protect their vital interests.[21]

In 1959, Congress again afforded relief to employers subject to picketing pressures. The floor debates which now form the legislative history of the Landrum-Griffin amendment show a primary concern to protect

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[19] This same argument was rejected in *Scofield* where this Court found that the absence of specific language providing for intervention in Section 10(f) review proceedings did not indicate that Congress intended to preclude such intervention. 382 U.S. at 209-10.

[20] Cf., e.g., *Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353; *Lane* v. *Brown*, 372 U.S. 477.

[21] The eventual determination of the merits of the charge, as Congress recognized when it enacted Section 10(l), fails to provide a practical remedy for the employer faced with injurious unlawful picketing. See footnote 6, *supra*. Moreover, as in the instant case, participation in a much later enforcement proceeding is clearly no substitute for participation in the 10(l) proceeding nor will it in any way suffice to protect the substantial interests of the charging party involved therein. Cf. *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327. The problem is amply illustrated in the instant case where the District Court Judge, believing that the General Counsel would lose its case before the Board, refused to grant

neutral employers such as the Petitioner in the instant case from secondary boycotts. The debates are replete with statements such as those by:

Senator Curtis:

> "Some of the most flagrant practices of labor racketeers are made possible by the inadequacy of the existing secondary boycott provisions."

Senator Goldwater:

> "If we do not prohibit secondary boycotts, as was intended by the Taft-Hartley Act; if we allow blackmail picketing to continue, we shall not have an effective labor bill."

Senator Morse:

> "The Landrum-Griffin bill was intended to be an effective and efficient instrument for closing the (secondary boycott) loopholes about which employers have rightly complained."

Senator Ervin:

> "There is a need for a clarification of the law affecting secondary boycotts; indeed there is a crying need for such legislation."

Senator Dirksen:

> "I want (secondary boycotts) stopped. So does America."[22]

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the injunction. His opinion of the case however, was not at any time shared by the Board which later found that the Union had engaged in an unlawful secondary boycott. Thus, though it was ultimately determined that the employer had been wronged, he was precluded from obtaining the statutory remedy to which he is entitled in Section 10(l) of the Act by the Circuit Court's refusal to grant him standing to appeal the District Court's erroneous decision. Few retailers could have withstood picketing for almost a year.

[22] II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

3. The decision below conflicts with the recognition accorded by other courts to the fundamental right of Board charging parties to participate in proceedings governing their essential interests.

This Court's decision in *Scofield* recognized the legitimate role of charging parties in judicial proceedings arising from their charges, a role which "will not impair effective discharge of [the Board's] duties and may well promote the public interest." Such participation permits "all relevant material" to be brought to the attention of the appellate court, makes for "more meaningful" briefs and, of perhaps particular relevance to the instant case, guarantees "that the Board interpretation of the relevant provisions accords with the intent of Congress." 382 U.S. at 215, 219.

The Board has similarly acknowledged that participation by charging parties in 10(l) proceedings serves the public interest:

> "Section 10(l) of the Act . . . provides for the participation of the charging party in the injunction action. A record has not yet been made, and the participation of the charging party may be helpful in the development of it." Brief for the National Labor Relations Board in *United Automobile Workers* v. *Scofield*, *supra* at p. 19, n. 13.

The *Scofield* decision also recognized that participation by charging parties in judicial proceedings is necessary to protect their rights when the Board reevaluates its position during the pendency of a case. In such a situation, the Board General Counsel "cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine

which the Board itself has abandoned." 382 U.S. at 215, n. 7.

These considerations are all the more pertinent where the Board, as in the present case, declines to seek appellate review for reasons which may be wholly unrelated to the merits of the controversy. Access to such review by the charging party then becomes fundamental to the protection of both the vital private and public interests involved. As Professor Jaffe observed:

> "The union [in *Scofield*] suggested that if allowed to intervene it could seek Supreme Court review of an adverse decision though the Board were indifferent or opposed. And why not? *If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling?* I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. *But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection.*" Jaffe, Judicial Control of Administrative Action, p. 545 (1965) (emphasis supplied; footnote omitted).

A failure to appreciate the "central interest" of the charging party, and a concomitant idolatry of the Norris-LaGuardia Act, are the hallmarks of the decision below. The decision therefore collides with the teachings of this Court in *Scofield*. It is contrary to the intervention rights permitted charging parties by the Second and Sixth Circuits[23] and the expanding rights of charging parties generally recognized by the

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[23] *McLeod* v. *General Electric Co., supra; NLRB* v. *Nashville Building & Construction Trades Council; supra.*

Third Circuit,[24] the Board itself[25] and Congress.[26] The decision conflicts with *Houston Insulation Contractors Association* v. *NLRB*, 339 F. 2d 868 (5th Cir., 1964), where, *at the instance of the charging party and over the objection of the Board*, the Fifth Circuit stayed a Board order and continued in effect a 10(l)

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[24] *Leeds and Northup* v. *NLRB*, 357 F. 2d 627 (3rd Cir., 1966).

[25] See, e.g., *Spector Freight System, Inc.*, 141 NLRB 1110 (1963). In addition, the Board's Rules and Regulations provide that "parties", which are expressly defined to include "any party filing a charge", are permitted during Board hearings to "call, examine, and cross-examine witnesses . . . to introduce evidence into the record . . . [and to] submit briefs, engage in oral argument, and submit proposed findings and conclusions . . ." Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Series 8, As Amended, Secs. 102.8 and 101.10 (1968). The retention of these provisions, despite a recommendation by an external investigating committee that charging parties not be designated as "parties" before the Board, clearly signifies that the Board considers full participation by charging parties to be administratively desirable. Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. Chi. L. Rev. 786, 791, n. 33 (1965).

[26] This Court in *Scofield*, for example, found "helpful analogies" in the Judicial Review Act of 1950, 5 U.S.C. §§ 1031-42 at § 1038, and the then-existing provisions of Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a)(2) has subsequently been amended to offer an even more compelling analogy in support of the charging parties' right to intervene:

> "*Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

injunction.[27] And it is diametrically opposed to the construction of Section 10(l) by the Ninth Circuit in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra,* which emphasized the critical distinction between a charging party independently petitioning for injunctive relief, or seeking relief different from that sought by the Regional Director, and the charging party merely supporting the Board's original petition for injunctive relief. In the latter case, that Court, in marked contrast to the court below, found no inconsistency "in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."

The application of *Scofield* to Section 10 injunction proceedings should be resolved by this Court. The conflict which exists between the decision below and the decisions of the Second, Third, Fifth, Sixth and Ninth Circuits involving rights of substance and importance also requires this Court's review and harmonization.

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[27] The main thesis of the dissent in *Houston Insulation* was that, by virtue of the Norris-LaGuardia Act, the Court lacked jurisdiction "to grant the private petitioner's motion for stay and thereby to reinstate the [10(l)] injunction or continue it in force." It thus mirrors closely the decision below and highlights the sharp conflict which exists between the Fifth and Tenth Circuits.

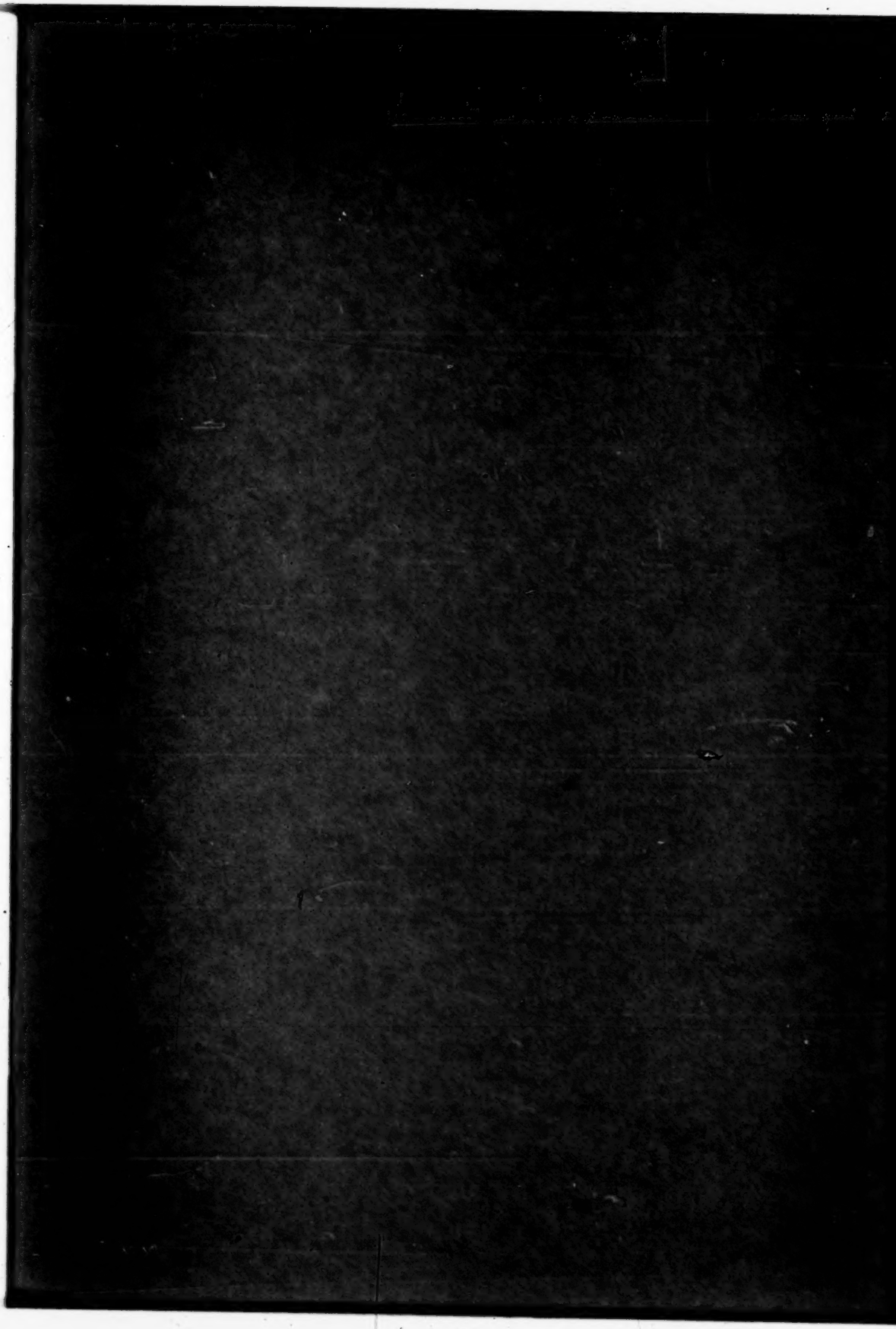
CONCLUSION

For the foregoing reasons, the Federation urges that the petition for writ of certiorari should be granted.

Respectfully submitted,

BRICE I. BISHOP
PHIL B. HAMMOND
Suite 420
1819 H Street, N.W.
Washington, D.C.
Attorneys for
American Retail Federation
as Amicus Curiae

SHIMMEL, HILL & BISHOP
Suite 420
1819 H Street, N.W.
Washington, D. C.
Of Counsel



IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476.

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,
Respondent,

AND

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF TERMINAL FREIGHT HANDLING COMPANY AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER.

Terminal Freight Handling Company and Terminal Freight Cooperative Association respectfully move for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari herein.

Terminal Freight Handling Company and Terminal Freight Cooperative Association are currently engaged, as appellants, in a proceeding before the Third Circuit Court of Appeals (Nos. 17,907, 17,910), which involves the same issues as those raised in the petition filed herein by Sears, Roebuck and Co. Specifically, the Third Circuit case concerns the question whether, under Section 10(l) of the National Labor Relations Act, a charging party before the Board has standing to protest the District Court's approval of a settlement stipulation in lieu of the injunctive relief desired by the charging party, and whether the charging party has standing to appeal the District Court's decision.

1. Thus, the Third Circuit case involves essentially the same question on the nature and extent of charging parties' appellate rights under the same section of the statute as that which is involved in the Sears' case. Moreover, in the briefs which have been filed in the Third Circuit, the decision of the Tenth Circuit, from which review is being sought, has been cited as analogous precedent. The holding of the Tenth Circuit, therefore, may well govern and control the result in the Third. In asking leave to file a brief in aid of Petitioner's efforts to review and set aside the Tenth Circuit decision, movants seek to protect and advance their vital interests, which the Tenth Circuit decision has placed in jeopardy.

Oral argument in the Third Circuit is scheduled for this autumn.

2. Terminal Freight Handling Company and Terminal Freight Cooperative Association believe that a full resolution of the question of charging parties' rights under Section 10(l) can best be made by this Court when it is

confronted with the varying situations in which the same problem can and does arise, and the effect on which should be considered by this Court in articulating an appropriate and encompassing decisional rule. For example, the Tenth Circuit case involves a charging party's appeal from the merits of an adverse District Court decision. The Third Circuit case differs in that the charging parties there sought to appeal both the District Court's denial of their exercise of granted rights of participation in the District Court as well as the decision itself which resulted therefrom. Yet, both appeals, though differing in nature of the deprivation sought to be reviewed, are predicated upon the same granting of rights to the same parties by the same language in Section 10(l) of the Act. Knowledge of the circumstances of the Third Circuit case will assist this Court both in appreciating the need to address itself to the question of the range of charging parties' rights flowing from Section 10(l), and in dealing with the problems creating that need.

3. Terminal Freight Handling Company and Terminal Freight Cooperative Association have, pursuant to Rule 42 of the Rules of this Court, requested consent of all parties to file a brief *amicus curiae* in this matter. While consents were forthwith received from the Honorable Erwin N. Griswold, Solicitor General of the United States, and from Sears, Roebuck and Co., consent was not received from the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO.

Wherefore, in recognition of these considerations and in view of the general importance of the issues involved and of the vital interest therein of Terminal Freight Handling Company and Terminal Freight Cooperative Associa-

tion, it is respectfully requested that this Motion for Leave to File a Brief *Amicus Curiae* be granted.

Respectfully submitted,

CHARLES C. KIEFFER,
KIEFFER & MORONEY,
1875 Connecticut Avenue, N. W.,
Washington, D. C. 20009,
Attorney for Terminal Freight Handling Company and Terminal Freight Co-operative Association.

Of Counsel:

JERRY KRONENBERG,
BOROVSKY AND EHRLICH,
111 West Washington Street,
Chicago, Illinois 60606,

JOHN W. PELINO,
PELINO, WASSERSTROM & CHUCAS,
Architects Building,
17th and Sansom Streets,
Philadelphia, Pennsylvania 19103.

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BRIEF AMICUS CURIAE ON BEHALF OF TERMINAL FREIGHT HANDLING COMPANY, AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476.

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent.

AND

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF TERMINAL FREIGHT HANDLING COMPANY AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI HEREIN

INTEREST OF THE AMICUS CURIAE

Terminal Freight Handling Company and Terminal Freight Cooperative Association (also herein called "Com

pany" and "Association", respectively), are appellants' in a case currently pending before the Third Circuit Court of Appeals[2] which involves the same general question as that presented in the captioned petition herein supported. Briefs have already been filed in the Third Circuit and oral argument is scheduled for sometime this autumn.

In the Third Circuit case, just as in the instant *Sears* case, charges were filed with the National Labor Relations Board alleging that the charged respondent-union was engaging in an unlawful secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(B). The Regional Director found merit in the charges and, pursuant to his mandatory duty under Section 10(l) of the Act, petitioned the District Court for appropriate injunctive relief. However, prior to the District Court's hearing on the injunction petition, the Regional Director and the respondent union agreed to a stipulation providing that the union would cease its alleged unlawful conduct. The Regional Director then moved the District Court to approve this Stipulation in lieu of conducting a hearing on its petition and granting injunctive relief. The Company and the Association, charging parties before the Board, opposed the approval of the

1 The Association is a non profit organization, consisting of forty six (46) companies, which receives less than carload and less than truckload shipments, consolidates such shipments into carload lots and reships such goods to members' plants at various locations throughout the United States.

The Company is a non-profit Delaware corporation engaged in the handling, consolidation and transshipment of freight as manager of the Association. It operates thirty six (36) terminal facilities in twenty four (24) States and the District of Columbia.

2 That case, filed in the Third Circuit on May 15, 1969 and docketed as Nos. 15,907 and 15,910, is entitled *Bernard Samoff, Regional Director of the Fourth Region of the National Labor Relations Board, Petitioner Appellee, v. International Association of Machinists, District Lodge No. 1, Respondent Appellee (Terminal Freight Cooperative Association, Charging Party Appellant and Terminal Freight Handling Co., Charging Party Appellant)*

Stipulation which would deprive them of the protection of a court-ordered injunction and the potential sanction of contempt connected therewith. The District Court judge declined to hear and consider the charging parties' objections, however. He predicated his refusal on the ground that they did not possess the status of "parties" in the District Court proceeding; that is, they were not "parties" and had not moved to "intervene", although their counsel had filed an appearance in the case, and therefore they were asserted to lack standing to be heard.

The judge incorporated this ruling in his Order approving the Stipulation:

> "The Stipulation of Petitioner [the Regional Director] and Respondent as modified and initialed by them is hereby approved over objection of Terminal Freight Cooperative Association and Terminal Freight Handling Co., Charging Parties, who, having entered their appearances by counsel but who have not moved to intervene, do not constitute parties and lack standing to be heard on their objections."

Thus the charging parties were not permitted to protest what they viewed as the Regional Director's compromise of his original position in which he sought a hearing on his Petition and an Order of Court granting injunctive relief, which compromise had resulted in damage to their essential interests and deprived them of the specific relief called for by the Act.

The Company and the Association, the charging parties, appealed the judge's Order to the Third Circuit on the ground that they were denied their rights as "parties" to the proceedings in the District Court, the existence of which status obviated any need to seek to intervene in that court, and were thereby deprived of rights guaranteed them in Section 10(l) of the Act.

The Board moved to dismiss the appeal in the Third

Circuit on two grounds which are relevant here. First, charging parties lack standing to appeal *either* the alleged denial of rights conferred upon them in the District Court by Section 10(1) or the result reached by the District Court judge; this lack of standing was said to be a consequence of the statute's failure expressly to accord them such appellate rights. Second, the Norris-La Guardia Act, 29 U. S. C. §§ 101-115 (1982), bars any efforts by private parties to secure injunctive relief, whether by an initial application to the courts or by an effort to correct an erroneous refusal to grant such relief pursuant to a petition filed by the Board.[3]

It is clear, therefore, that the legal issues posed in the Third Circuit are identical to those involved in the instant appeal by Sears and that a decision on the merits in the latter case will control the disposition of the former.

Moreover, the need for determining the nature and limits of charging parties' appellate rights under Section 10(1) can best be understood by appreciating the various contexts in which the issue arises and in which the impact of a resolution will be felt. It is further in the interest of all parties whose rights will be directly affected, should Sears' petition be granted, that this Court be apprised of the varying situations which its decision will control and for whose resolution it should therefore be tailored.

REASONS FOR GRANTING THE WRIT

(1) The Wide Range of Charging Parties' Vital Interests Requiring Clarification and Protection

The ramifications of a determination of charging parties' judicial rights under Section 10(1) of the Act are important, manifold and unexplored in this Court.

[3] The Third Circuit reserved ruling on the Board's motion until after it hears oral argument on the case later this year.

In *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283 v. Scofield et al.; United Automobile, Aerospace and Agricultural Implement Workers et al. v. Fafnir Bearing Company et al.*, 382 U. S. 205, this Court declared the *right*, after a final Board order, of successful charging parties to intervene and participate as full "parties" in the appellate consideration of their cases notwithstanding the Board's participation on their behalf. Section 10(f) of the Act confers an equivalent right upon unsuccessful charging parties.

The question posed under Section 10(l) is whether any such rights exist on behalf of charging parties when the judicial consideration of their charges occurs prior to a final Board order. It is submitted that the rationale of *Scofield* and *Fafnir* compels the extension of this Court's recognition of charging parties' vested rights in the judicial litigation of their charges to all stages of that process.[4]

4. In arguing the irrelevance of *Scofield* to cases arising under Section 10(l), the Board's brief in the Third Circuit case emphasized the fact that *Scofield* dealt with the review or enforcement of final orders under Sections 10(e) and (f) rather than the securing of temporary injunctive relief under Section 10(l). The Board's attempted distinction is without merit. First, *Scofield* argued in terms of general truths concerning this right to be heard fully and effectively. The exercise of this right should not depend upon whether the hearing is on a request for needed permanent or needed temporary relief. Second, Section 10(h) of the National Labor Relations Act exempts from the operation of the Norris-LaGuardia Act *all* federal court proceedings authorized under Section 10—including 10(e), (f), (j) and (l)—so that no distinction between suits for permanent relief (10(e) and (f)) and temporary relief (10(l)) can be predicated upon Norris-LaGuardia. Third, the basis for permitting charging parties to participate in proceedings under 10(e) and (f) apply equally to 10(l), *i.e.*, to prevent harm to the charging party through an adverse decision to which the charging party was not a full and effective participant. The damage which an unlawfully boycotted employer may suffer who is unable to secure temporary injunctive relief from an illegal strike is no less than the damage he may suffer as a consequence of a final order of the Board. Surely, mere speculation as to the

The problem has arisen in a variety of contexts. The *Sears* case in the Tenth Circuit involved the right of charging parties under Section 10(l) to appeal an adverse order of the District Court when the Board refused to appeal. The pending *Samoff* case in the Third Circuit deals with the rights of charging parties to appeal the District Court's erroneous refusal to permit them to exercise there the participatory role expressly granted them in Section 10(l), as well as to appeal the District Court's refusal to grant injunctive relief. The question in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), concerned the extent to which charging parties could perform an independent role in the District Court in support of the Board's petition for an injunction after the Board changed its mind about pursuing the relief sought in its own petition. *Houston Insulation Contractors Association* v. *NLRB*, 339 F. 2d 868 (CA 5, 1964), involved a charging party's attempt to secure a stay of a Board order in the Court of Appeals the effect of which would be to continue in force an injunction granted under Section 10(l) which would otherwise have expired. And in *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, ___ F. 2d ___, 69 LRRM 2537 (CA 9, 1968), a successful charging party sought to intervene in the Appellate Court in an action brought by a union to review the District Court's grant of injunctive relief under Section 10(l).

Although each of these cases involved a somewhat different question from the others, yet they are alike in that the result in each hinged on an interpretation of the rights accruing to charging parties under Section 10(l) of the Act.

---

difference, if any, in the quantum of damage suffered cannot serve as the basis for denying the right to the fullest possible participation by the charging party.

It follows, therefore, that the logic of *Stofield* applies as well to cases under Section 10(l).

The variety of situations in which charging parties' rights depend upon an analysis of the meaning of that Section invites this Court's attention. The diversity among the Court of Appeals' decisions which have undertaken such an analysis requires such attention. Thus the Tenth Circuit in the *Sears* case prohibited charging parties from appealing a denial of the Board's petition for injunctive relief principally in reliance upon the alleged requirements of Norris-La Guardia,[5] while the Ninth Circuit in *Retail Clerks* held Norris-La Guardia to be irrelevant to charging parties' efforts to support the Board's petition in the courts. Although the Fifth Circuit in the *Houston* case expressly reserved decision on the applicability of Norris-La Guardia to charging parties' efforts to obtain injunctive relief via a stay, both the court's language and its action in granting the stay strongly suggest that it would not find Norris-La Guardia to constitute a bar in cases where the Board had itself filed a petition for such relief at an earlier stage in the case. And whereas this Court in *Scofield* accorded successful charging parties equal status in the appellate courts with those who had not been successful, the later Ninth Circuit decision in *San Francisco-Oakland* refused to do so by denying charging parties the right to intervene at the appellate stage of Section 10(l) litigation.[6]

5. The *Sears* case appears to constitute the first instance in which a charging party before the Board has argued that it enjoyed the status of a "party" in 10(l) cases without the need, therefore, for seeking to intervene in order to protect its rights.

6. Although the Ninth Circuit restricted charging parties to the status of *amicus curiae* both in *Retail Clerks* and in *San Francisco-Oakland*, that result may well be attributable to the fact that in neither case did the charging parties argue that they were accorded "party" status in Section 10(l). An additional consideration may be that the charging parties in both cases had been successful in obtaining injunctive relief in the District Courts and, in the Ninth Circuit's view, could adequately protect their rights by filing briefs since the Board continued to represent their

Accordingly, in recognition of the range of problems which have arisen, and which will continue to arise in the absence of this Court's illumination of charging parties' judicial and appellate rights under Section 10(l), together with the need to harmonize the conflicting decisions of the Courts of Appeals which have explored the breadth of those rights, this Court should grant Scars' petition for writ of certiorari.

(2) Congress Intended to Confer Appellate Rights on Charging Parties in Proceedings Under Section 10(l)

The scheme of the National Labor Relations Act, which makes the interests of the charging party central to all proceedings, is inconsistent with a denial of appellate rights at any stage of litigation resulting from an initiation of agency action. Scars' petition for writ of certiorari herein demonstrates this point at pp. 6-12. See also Jaffe, *Judicial Control of Administrative Actions* p. 545 (1965). In addition to the matters raised there, the following additional points make clear Congress' purpose to confer such appellate rights in Section 10(l).

(a) Legislative History of Section 10(l)

The debates preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the degree to which charging parties before the Board should be accorded the rights of parties to full participation in, and independent access to, the District Courts in cases where unions engage in unlawful secondary and organizational picketing

interests in the Court of Appeals. Such a rationale could not apply in cases such as Scars' Tenth Circuit case, where the charging party was unsuccessful in the District Court and the Board refused to appeal. In such cases, absent a right to seek review directly, the charging parties find themselves with interests to protect but no judicial vehicle to which to protest them.

An analysis of these debates reveals that in Section 10(l) Congress effected a compromise; while it limited charging parties' rights independently to initiate injunction proceedings in the courts, at the same time it sought to guarantee to charging parties the right of full participation in such proceedings once they were initiated by the Board.

The essential conflict which Congress was required to resolve was between the interest of private parties to the speediest and most direct remedy against the devastating effects of illegal boycotts and strikes, and the opposing policy of the Norris-La Guardia Act to limit the jurisdiction of the District Courts to issue injunctions in labor disputes. The former interest required expeditious access to the courts' injunctive processes; the latter policy offered protection against a system whereby private parties could create a body of law formed by courts from theories urged by private parties independently of or in conflict with these urged and developed by the Board.

By way of resolving these conflicting values the House bill elected to permit private parties to move independently and unilaterally for injunctive relief:

> The House bill [H. R. 3020], in section 12, provided for injunctions at the request of private persons, rather than by the Board, in cases under Section 10(l). *House Conference Report* No. 510, Leg. Hist. 561

This provision was not adopted since it would have constituted a virtual repeal of Norris-La Guardia. However, similar proposals were made in the Senate, evidencing the tangible support which existed for direct private injunctive relief.

Throughout the Senatorial debates on the Taft-Hartley amendments and all the most serious and recurring disputes centered on the so-called Ball amendment. Senator

Ball sought to convince his colleagues that private parties should be permitted to seek court injunctions whenever they were individually aggrieved by secondary boycotts and other unlawful picketing, and without prior recourse to the Board. It was argued that this was the best method for avoiding potential harm (Leg. Hist. 561-562, 1057-1058, 1350). As argued by a supporter of this amendment, Senator Donnell,

> "[An injured party] should be entitled to engage his own attorney, go into a court which he selects, and direct the conduct of his litigation." (Leg. Hist. 1353.)

The Ball amendment was defeated, however, for the same reasons which prevented the adoption of the similar provision in the House bill; while Congress was sympathetic to the needs of private parties for the protection afforded by injunctive relief, it was unprepared to permit them to *initiate* such suits independently and at will (Leg. Hist. 1057-58, 1149, 1370, 1544).

Section 10(l), as ultimately enacted, predictably represented a compromise. (1) In order to provide a meaningful remedy for employers faced with injurious unlawful picketing, mandatory injunctive relief was afforded. (2) However, in order to avoid a situation where employers could forum-shop and achieve an independent development of the law through *their* selection of theories of violation and relief, the right to *initiate* injunction suits was limited to the Board. (3) In order to guarantee private parties the right to full participation in court proceedings stemming from unlawful strikes and picketing, *after* the Board initiates the action, Section 10(l) was drafted expressly to confer on charging parties rights associated only with full "party" status. (4) And in order to eliminate the possibility that Norris-La Guardia might be interpreted to impose a limitation either on the Board's right to institute such injunction proceedings or on charging parties'

rights thereafter to fully pursue their interests in those proceedings, Congress enacted Section 10(h) providing:

> "When granting appropriate temporary relief or a restraining order, . . . as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115) [Norris-La Guardia Act]."

Accordingly, a review of the legislative history of Section 10(l) reveals Congress' purpose, specifically expressed in the statutory language, to accord private charging parties the full rights of "parties" in District Court proceedings, limited only by their inability to file such actions in the first instance or to expand the theories, facts, or relief sought in the Board's pleadings. Consequently, when the Board does initiate an injunction action, and charging parties thereafter seek the success of the Board's petition, whether in the District Court or in appellate courts, charging parties thereby exercise rights which the legislative history of the Act demonstrates that Congress intended them to possess.

(b) Charging Parties' Status in Proceedings Under Section 10(l) Was Made Analogous to Their Status in Administrative Proceedings Before the Agency in Which They Are Accorded the Right of Appellate Review.

Although their charges initiate the Board's investigation of their cases, charging parties cannot compel the Board to issue a complaint; that right, under Section 3(d) of the Act, is within the exclusive province of the Board's General Counsel. *Hourihan v. NLRB*, 201 F. 2d 187 (CA DC, 1952), cert. den. 345 U. S. 930. Neither can the charging parties control what the complaint shall allege nor seek unilaterally to expand its allegations once it is filed. *Pia*

judicial process," similarly the Board may not control the courts' expeditious use of cases under Section 10(l) once the filing of the Board's petition for an injunction has conferred jurisdiction on the courts. In both instances rights conferred on charging parties give them an independent role in pursuit of the aspects of the Board's complaint or its petition under Section 10(l).

(c) Congress Would Not Have Made the Exercise of Charging Parties' Vested Rights a Matter of Fortuity

Pursuant to the decision of the Tenth Circuit which Sears seeks to sustain in this Court, the protection of charging parties' vested rights under Section 10(l) depends upon the Board's willingness to seek judicial review. This applies both to a District Court's denial to charging parties of rights expressly conferred *upon them* in Section 10(l), as well as to the erroneous denial by the District Court of the relief to which charging parties are entitled. Moreover, the Board's decision as to whether or not to appeal adverse and erroneous court decisions often depends, as this Court noted in Scofield, on "tactical" or "administrative" considerations unrelated to the merits. The Tenth Circuit thus would render the enforcement and protection of charging parties' rights subject to fortuities and extraneous considerations beyond their power to control or affect.

Furthermore, the Tenth Circuit's decision would import into the Congressional scheme an obviously unintended paradox: should the District Court find merit in the Board's petition and grant an injunction, the adjudged wrongdoer has an immediate right to appellate review; though the District Court erroneously refuses to grant an injunction, the wronged victim has no such right.

The Tenth Circuit would permit such review since the Norris-LaGuardia Act could constitute no bar to an appeal since no injunction had already been granted pursuant to the Board's petition.

Absent a clear statement that Congress in fact intended such results, the converse of which is true, no such assumptions should be indulged.

(d) Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act

Sections 10(j) and 10(l) are alike in that both authorize the Board, acting through its Regional Directors, to institute petitions for injunction when the Regional Director believes that charged unions have engaged in such injurious unfair labor practices as to render extraordinary injunctive relief appropriate. The sections differ only in that pursuant to Section 10(j) injunctive relief *may* be sought for any violation of the statute whereas Section 10(l) provides that such relief *must* be sought for the violation of the specific and particularly injurious unfair labor practices enumerated therein.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition and be permitted to appear by counsel and present any relevant testimony, Section 10(j) requires only that they be notified of the filing of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections manifest Congress' intent to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests. Such a guarantee goes beyond the presence at and the representation by the Board, which was deemed adequate to protect charging parties in cases arising under 10(j), but affirmatively conferred upon charging parties in 10(l) cases the status of "parties."

The difference between the rights accorded in the two sections is justifiable on two grounds. First, the nature of the unlawful acts with which Section 10(l) deals inherently involves the greatest potential harm to their aggrieved victims. For this

Indeed, if Congress believed that the judgment and participation of the Board in injunction proceedings under Section 10(l) would suffice fully to protect the charging parties' interests, and that they should have no *independent* role in the participation and prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights upon charging parties in 10(l) cases which were denied to those in 10(j) cases. The adoption of such a view would render meaningless the deliberate statutory distinction between the rights conferred in the two sections. It follows, therefore that Congress intended to accord charging parties in 10(l) cases the status of "parties", clothed with the rights of that status.

(3) The Tenth Circuit's Decision Represents a Retrogressive Step in the Judicial Evolution of Charging Parties' Rights

There has been recently an expanding awareness in the courts of the legitimate rights and interests of charging parties under the Act. The decision of the Tenth Circuit constitutes an unfortunate retreat from the movement of those courts.

The Ninth Circuit's decision in *Retail Clerks* represented an effort to narrow the discretion of charging parties' rights from the level of right to that of an accident of their

SHOULD THIS COURT GRANT THE PETITION FOR WRIT OF CERTIORARI, IT IS REQUESTED TO DELAY ORAL ARGUMENT UNTIL AFTER THE THIRD CIRCUIT RENDERS ITS DECISION IN SAMOFF v. INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1 (NOS. 17,907; 17,910)

As explicated above, the *Samoff* case now pending in the Third Circuit, in which Terminal Freight Handling Co. and Terminal Freight Cooperative Association are involved as appellants, raises the same issues, in a related context, as does the instant case. If this Court grants Soars' petition, it is submitted that all parties would benefit from having before them the Third Circuit's decision on the same question being argued here. Whatever decision is reached in *Samoff*, it will create a further conflict in the already divided Circuits. Delaying oral argument will thus enable this Court to resolve all such conflicts at once, aided by the thinking of still another court which will have devoted itself to an analysis of these issues. Inasmuch as the Third Circuit case is scheduled for argument this autumn, no substantial delay would result from the granting of this request.[9]

[9] This Court has granted such requests in the past at the instance of amici curiae. See, for example, the similar request made and granted in *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission and United States of America*, U. S. ——— (No. 690, October Term, 1967).

CONCLUSION.

For the foregoing reasons, it is urged that this Court grant Sears' petition for a writ of certiorari and delay oral argument in the case until the Third Circuit renders its decision in *Samoff v. International Association of Machinists, Lodge No. 1*, docketed in that court as Nos. 17,907 and 17,910.

Respectfully submitted,

JERRY KRONENBERG,
BOROVSKY & EHRLICH,
111 West Washington Street,
Chicago, Illinois 60602,

JOHN W. PELINO,
PELINO, WASSERSTROM & CHUCAS,
Architects Building,
17th and Sansom Streets,
Philadelphia, Pennsylvania 19103,

CHARLES C. KIEFFER,
KIEFFER & MORONEY,
1875 Connecticut Avenue N. W.,
Washington, D. C. 20009,
Attorneys for Terminal Freight Handling Co. and Terminal Freight Cooperative Association.

SUPREME COURT, U. S.

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No. 176

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

SEARS ROEBUCK AND CO., PETITIONER

v.

CARPET LAYERS, ETC., LOCAL UNION NO. 419, AFL-CIO, and CLYDE F. WEBER, Regional Director of the Twenty-Seventh Region of the NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE REGIONAL DIRECTOR IN OPPOSITION

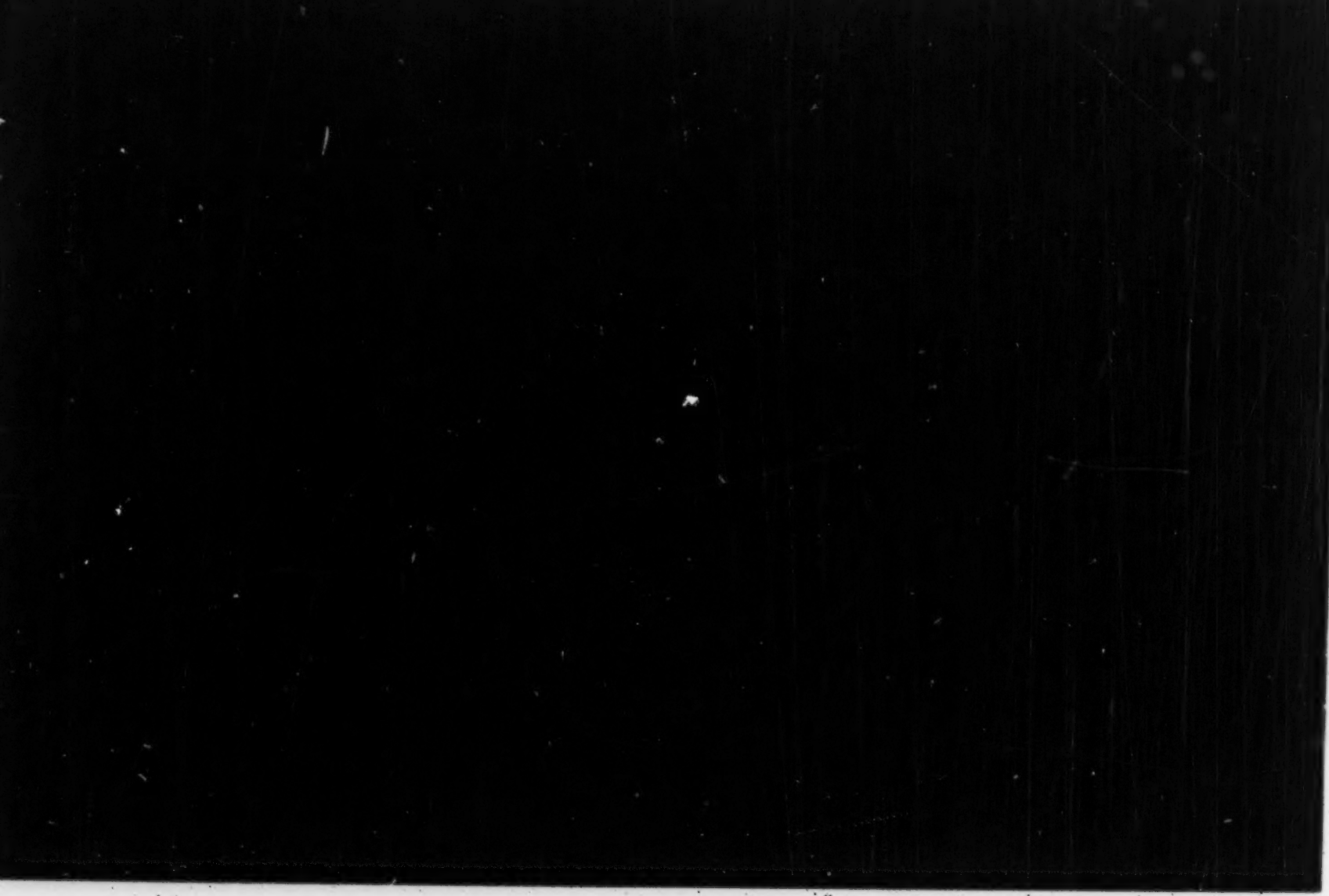
ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C., 20570.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS ROEBUCK AND CO., PETITIONER

v.

CARPET LAYERS, ETC., LOCAL UNION NO. 419, AFL-CIO, and CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE REGIONAL DIRECTOR IN OPPOSITION

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1. Petitioner filed a charge with the National Labor Relations Board that respondent union was engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act. Upon determining that a complaint should be issued, respondent Waers, the Regional Director of the National Labor Relations Board, petitioned the United States District Court for the District of

Colorado for a temporary injunction pursuant to Section 10(*l*) of the Act. After a hearing, the district court denied an injunction (Pet. App. A7-A13). Although the Regional Director did not appeal from this decision, petitioner, the charging party, sought to do so. The court below dismissed petitioner's appeal, accepting the Regional Director's contention that petitioner lacked standing to appeal (Pet. App. A1-A6).

2. The question which petitioner seeks to present —whether the charging party before the Board has standing to appeal the district court's denial of Section 10(*l*) injunctive relief where the Board's Regional Director determines not to appeal that decision—has become moot in this case. By its terms, Section 10(*l*) merely authorizes the issuance of an injunction "pending the final adjudication of the Board with respect to [the] matter" (Pet. App. A68). On June 20, 1969, subsequent to the decision of the court of appeals herein, the Board issued its decision and order in the case, finding that the union had violated Section 8(b)(4)(B) of the Act and ordering the union, *inter alia*, to cease and desist its unlawful conduct (Pet. App. A14-A18). Thus, there has been a "final adjudication of the Board" with respect to petitioner's charge, and there is no longer any basis for a Section 10(*l*) injunction. Indeed, if an injunction had been issued by the district court, it would have terminated with the issuance of the Board's decision. See, *e.g.*, *Carpenters' District Council* v. *Boire*, 288 F. 2d 454, 455 (C.A. 5); *Monique, Inc.* v. *Boire*, 344 F. 2d 1017, 1018 (C.A. 5); *Reyn-*

olds v. *Nashville Bldg. Trades Council*, 383 F. 2d 562, 564 (C.A. 6).[1]

3. In all events, the court of appeals correctly concluded that petitioner's assertion that a charging party has a right to maintain an appeal in its own behalf finds no support in the language of Section 10(l) and is inconsistent with the circumscribed injunctive remedy which Congress entrusted to the initiative and management of the regional director (Pet. App. A4-A5). There is no conflict of decisions on this point. The Ninth Circuit recently reached the same conclusion in a comparable situation, and this Court declined to review its ruling. *Los Angeles Herald Examiner* v. *San Francisco-Oakland Newspaper Guild, et al.*, No. 409, O.T., 1968, certiorari denied, 393 U.S. 926. *Auto Workers* v. *Scofield*, 382 U.S. 205, and *Retail Clerks Union* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (C.A. 9), are distinguishable for the reasons given by the court of appeals (Pet. App. A5-A6).

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[1] The final Board decision in the present case is pending on review in the District of Columbia Circuit, pursuant to petitions filed under Section 10(e) and (f) of the Act. *Carpet Layers, etc., Local 419* v. *National Labor Relations Board*, No. 23223, C.A.D.C. Should injunctive relief be deemed appropriate pending a decision by the court of appeals, the Board is empowered, under Section 10(e), to petition that court for such relief. See *McLeod* v. *Business Machine Conference Board*, 300 F. 2d 237, 241 (C.A. 2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

SEPTEMBER 1969.

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[2] Since the district court denied injunctive relief and since there appear to be no collateral consequences arising from that decision, inasmuch as the underlying substantive issues have been resolved in the context of the Labor Board proceeding, we believe that disposition of this case by denial of the petition for a writ of certiorari, rather than by vacation of the judgment of the district court, would be appropriate. Compare *United States* v. *Munsingwear*, 340 U.S. 36.

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UPREME COURT, U. S.

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OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,
Respondent,

AND

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:
ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006,

KALVIN M. GROVE,
LEDERER, BARNHILL & FOX,
Chicago Title & Trust Building, Suite 1837,
111 West Washington Street,
Chicago, Illinois 60602,

DONALD L. GIACOMINI,
ROTHGERBER, APPEL & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

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IN THE

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OCTOBER TERM, 1969.

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The memorandum submitted by Respondent Regional Director in opposition to the petition for a writ of certiorari filed herein by Sears, Roebuck and Co. is comprised of two elements. The first consists of the Regional Director's announced faith in the correctness of the decision of the Tenth Circuit which denied Sears the right to appeal an erroneous District Court denial of injunctive relief to which Sears was entitled under Section 10(l) of the National Labor Relations Act. The second alleges that the Decision and Order of the National Labor Relations Board on the merits of the underlying dispute renders Sears' appeal moot.

This Reply is devoted principally to the issue of mootness.

I. THE REGIONAL DIRECTOR'S BASES FOR ASSERTING THAT THE INSTANT APPEAL IS MOOT ARE WITHOUT FACTUAL OR LEGAL FOUNDATION.

A. The Relevant Facts: Sears' Need for Injunctive Relief.

So far as they relate to the question of mootness, there are few and uncontroverted facts:

1. Respondent Union's unlawful secondary picketing of Sears precipitated the filing of charges by Sears with the Board on August 9, 1968, and caused the Board, after appropriate investigation of the charges, to seek injunctive relief under Section 10(l) of the National Labor Relations Act on August 29, 1968.

2. The District Court refused to grant such injunctive relief in a decision rendered on October 4, 1968.

3. The Board refused to appeal this decision for reasons which it has never disclosed; instead the Board contented itself with prosecuting the Union's unlawful conduct in prolonged and time-consuming administrative proceedings.

4. Sears then sought to appeal the District Court's adverse ruling, an effort which failed when, on May 15, 1968, the Tenth Circuit dismissed the appeal solely on the ground that Sears lacked standing to lodge it.

5. On June 20, 1969, the Board issued its Decision and Order finding the Union guilty of the unfair labor practices charged.

6. The Union engaged in its unlawful picketing continuously and without cease from approximately August 7, 1968 until approximately June 26, 1969.

7. Accordingly, from June 20 until at least June 26, the Union picketed Sears in outright violation of the Board's Order.

8. By letter dated June 26, 1969, the Union, through its

counsel, notified the Board's Regional Director that it was undecided as to whether it would comply with the Board's Order; that it would cease its picketing of Sears only "in the meantime"; and that should the Union elect to resume picketing Sears, it would notify the Board ten days in advance of such resumption.[1]

9. On July 3, 1969, the Union filed a petition to review and set aside the Board's Decision and Order in a case now pending in the District of Columbia Circuit.[2]

10. This very Union has revealed a ready disposition to engage in those practices which the Board found to be unlawful in its Decision of June 20, 1969, and whose resumption was threatened by the Union in its letter of June 26, 1969. Thus, in three recent instances, two of which occurred subsequent to the Board's Decision in this case, the Board has been forced to seek injunctive relief against this same local Union, in the same city, for the same kind of picketing, against the same class of employers, and pursuant to the same type of dispute, as are involved in the instant Sears case.[3]

In consequence of these enumerated facts, certain conclusions necessarily follow. Respondent Union is prepared

1. A copy of this letter appears as Appendix "A", page SA 1, in the Supplemental Appendix attached to this Response. For the sake of clarity and further to authenticate this letter, copies of all correspondence which resulted in making this letter available to Sears are also reproduced as Appendices "B" through "E", pp. SA 2-11.

2. The Union's brief in the Court of Appeals, filed on about September 22, 1969, betrays its state of mind on the question of its intention to picket Sears. At page 25 of that brief "Sears can obtain the immediate surcease of the picketing by the simple measure of giving to its installers the prevailing rates of pay. The Union would then have no cause or reason to continue the picketing and would terminate it forthwith."

3. Copies of the Board's petitions for injunctive relief under Section 10(l) of the Act in all three instances are attached as Appendices "F", "G", and "H", pp. SA 12-40.

to engage in unlawful secondary picketing in furtherance of its imagined interests despite its knowledge that the Board considers such conduct to be illegal. It is prepared to do so, and has done so, in violation of an outstanding and unequivocal cease-and-desist Order of the Board. Since the Board's Order is not self-enforcing, it offers little deterrence to a Union predisposed to such conduct. Finally, the Union's expressed contemplation of a resumption of picketing emphasizes the jeopardy in which Sears now finds itself as a consequence of the absence of that injunctive relief to which it has always been entitled but has been unable to secure.

The Board's contention that the current appeal is moot is predicated upon the dual assumptions that (i) such injunctive relief is not needed, and (ii) even if it had been granted when sought, it would by now *necessarily* have expired. The fallacy of the first assumption is clear from the foregoing recital of the facts and their implications. The fallacy of the second assumption will be demonstrated below.

B. Had Injunctive Relief Been Granted Pursuant to Section 10(l) of the Act, Sears Could Presently Enjoy the Protection of Its Provisions.

Respondent Regional Director contends that injunctive relief under Section 10(l) automatically terminates upon the issuance of the Board's decision on the merits. This view is predicated upon the Regional Director's interpretation of the language of Section 10(l), which provides that injunctive relief may be obtained "pending the final adjudication of the Board". According to his interpretation, the Board's initial Decision and Order is synonymous with "final adjudication" within the meaning of the statute.

That result is required neither by logic, by equity, nor by

settled judicial opinion. On the contrary, Sears contends that a "final adjudication of the Board" should represent only that decision which ultimately and absolutely disposes of the disputed rights and duties of the parties. Accordingly, when the parties effect an amicable settlement of their dispute, which settlement is approved by the Board, that approval constitutes a "final adjudication" as nothing further remains to be resolved. Similarly, when neither party contests the terms of a decision of the Board, that, too, becomes a "final adjudication".

However, when an aggrieved party to a Board decision seeks review in the Court of Appeals, that decision loses its "finality". The court may enforce the Board's Order in whole, in part, or not at all; to the extent it refuses enforcement, the court may remand the case to the Board for a reconsideration of a legal judgment, for the taking of additional testimony, or for both. In circumstances where such appellate review is sought, to label the decision being reviewed a "final adjudication" constitutes an abuse of logic and language. In the instant case, Respondent Union's election to file the currently pending suit in the District of Columbia Circuit to review and set aside the decision of the Board which found the Union in violation of law, removed the "finality" from the Board's adjudication.

Support for Sears' position is found in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964). One of the issues in that case concerned the effect of a district court's action in granting injunctive relief under Section 10(l) "pending the final disposition of the matters involved". The court considered whether this grant of relief was impermissibly broad since it would extend beyond the mere issuance of the Board's decision and until the Court of Appeals rendered its own opinion on the merits of the Board's adjudication. The Fifth Circuit agreed that while the district court's action had precisely

the effect of prolonging the protection afforded by injunctive relief beyond the mere issuance of the Board's decision, such a result was consistent with the purpose and provisions of the statute:

> "We do not read [the district court's] language as going beyond the permissible scope of an injunction under § 10(l)—'appropriate injunctive relief pending the final adjudication of the Board'."

The Court's conclusion that an adjudication is not "final" when it is subject to reversal, amendment or remand, and when it does not, therefore, constitute "final disposition of the matters involved", is also supported by equitable considerations. Suppose a union were enjoined from engaging in unlawful secondary picketing pursuant to a proceeding under Section 10(l) of the Act. According to the Regional Director's contentions herein, upon the rendering of the Board's non-self-enforcing decision on the merits, the offending union becomes free of the terms of the injunction and free to resume its unlawful picketing.[4] Such a result, held the Fifth Circuit in the *Houston* case, serves, where appellate review is sought:

> ". . . to justify preserving the status quo until the case is finally disposed of in this [appellate] Court. Were petitioner to ultimately prevail, the beneficial effect of our decision would largely be vitiated, if while awaiting hearing and disposition, the Union were permitted to resume its activities."

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4. Under this view a resumption of the unlawful conduct could only be remedied by the Board's institution of a new suit for injunctive relief under Section 10(e) of the Act. But the Board is not required and cannot be compelled to do so. Moreover, Sears' experience in the instant case,—where the Board declined to appeal a district court's refusal to grant injunctive relief which the Board believed should have been granted—does not encourage reliance on the Board. In any event, the theoretical availability of such a tenuous concurrent remedy is no substitute for the quicker and more dependable relief afforded by the continuing protection of Section 10(l).

An additional and independent basis for rejecting the Regional Director's claim of mootness consists of the fact that the Board's decision, whether or not it is "final", did not adjudicate the question presented to this Court for review. The Board's opinion decided that the Respondent Union violated the labor laws and, by necessary implication, that the district court's refusal to grant injunctive relief was incorrect. But the question presented here for review relates to whether charging parties before the Board have standing to appeal the denial of injunctive relief,—not whether the denial itself was correct. Thus the question before this Court neither was, nor could have been, decided by the Board and, moreover, is totally unaffected by the merits of the Board's decision.

Nor do the authorities cited by the Regional Director require the dismissal of this appeal. *Carpenters' District Council* v. *Boire*, 228 F. 2d 454 (CA 5, 1961), involved a situation where the parties executed a formal voluntary bilateral settlement stipulation *following* the union's appeal of the granting of an injunction under Section 10(l). Since the stipulation resolved all matters involved in the injunction proceeding, the Board's approval of it constituted a "final adjudication" which did render further litigation concerning the injunction moot.

This is entirely consistent with Sears' prevoiusly expressed understanding of the meaning of "final adjudication" in Section 10(l). And in both *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (CA 5, 1965) and *Reynolds* v. *Nashville Bldg. Trades Council*, 383 F. 2d 562 (CA 6, 1967), the Board rendered a decision on the merits, while appeals were pending from adverse rulings in cases under Section 10(l), which also resolved the questions presented in the suits under Section 10(l). Thus a decision by the Courts on the appeals stemming from the injunction proceedings involved nothing more than a review of the merits of the Board's decision.

In a sense, therefore, the two cases became merged, with "mootness" the consequence of the merger.

In the instant appeal no such merger has occurred since the issue of standing to seek appellate review, which Sears presented to the Tenth Circuit and seeks to present here, cannot be decided by the Board either directly or indirectly, but is only for the courts to adjudicate.

II. AFFIRMATIVE SUPPORT FOR THE PROPOSITION THAT THE INSTANT APPEAL IS NOT MOOT.

Wholly apart from the considerations raised in the foregoing discussion of the elements of the Regional Director's contentions, other factors basic to a just and efficient judicial system impel the conclusion that the instant appeal is not moot.

A. Mootness Cannot Be Asserted So as to Deny Judicial Review of Short-Term Orders Which Are Capable of Repetition and Which Constitute Precedent in Future Similar Instances.

If the Regional Director is correct in contending that injunctive relief under Section 10(l) necessarily terminates when the Board renders its decision on the merits of the case, then the period during which such relief can exist is quite short. In the instant case, approximately eight and one-half (8½) months elapsed between the district court's ruling on the petition for injunctive relief and the subsequent issuance of the Board's decision. There is no reason known to Sears for doubting that this constitutes a typical period.

Under such circumstances, it would be virtually impossible ever to bring to this Court a case involving charges of judicial malfunction concerning or arising out of the grant-

ing or denying of injunctive relief; all such cases would become "moot" as they travelled their way through all the time-consuming stages of the judicial process which arrives, after the issuance of the Board's decision, in this Court. Yet each error committed below becomes precedent to be used against the interests of litigants who will be similarly unable to obtain review of their own "mooted" appeals. If this Court is ever to decide whether charging parties before the Board have standing to appeal a district court's denial of injunctive relief under Section 10(l), then its vehicle must be such a case as Sears brings here.[5]

Under the circumstances described, this Court has declared its refusal to apply the doctrine of mootness. In *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, et al.*, 219 U. S. 498, 515-6, the appellant sought to have declared illegal an order of limited duration of the I. C. C., which had expired by its own terms while pending appeal. The Commission defended on the ground that the case had become moot. This Court held that the doctrine of mootness does not aply to such situations, in which public rights and interests are involved and questions of law are presented, whose resolution "might serve to guide the municipal body when again called upon to act in the matter". This Court's extended rationale of its decision in *Southern Pacific* applies equally here:

"In the case at bar the order of the Commission may

5. A further difficulty in bringing such cases to this Court results from the fact that a majority of the charges filed with the Board involving violations of law which could result in injunctive relief under Section 10(l) are filed by small employers. During fiscal year 1968, over fifty per-cent (50%) of such charges were filed by employers having less than thirty (30) employees. It is unlikely that such employers would be able or willing to expend such sums as would be required to bring their cases here even if they had no reason to fear their being "mooted" out of Court. (Thirty-Third Annual Report of the N. L. R. B., Table 18, pp. 238-9).

to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

B. The Public Interest in the Clarification of Charging Parties' Appellate Rights Precludes a Finding That the Issue Is Moot.

Administrative agencies function essentially as trustees for the public under trusts created by Congress for the welfare and protection of the beneficiaries. The public has a substantial and legitimate interest in the development and clarification of rules and procedures adopted and employed on their behalf, including the creation of precedent which gives definiteness to the statutes which guide their conduct and describe or limit their rights. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. The importance of that interest should supersede technical questions concerning mootness where, as here, the presence of such an agency functioning as an active litigant assures that an adequate presentation of all issues will be made in the course of clarifying the statute's meaning.

"Not easy to weigh, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the decision could have no substantial effect on the parties who originally raised the question and that its usefulness would, as a result be largely confined to the creation of precedent." (Citations ommitted.) (Note, "*Moot*" *Administrative Orders*, 53 HARV. L. REV. 628, 630 (1940).

Whenever an inquiry into the provisions of a statute raises a Constitutional issue, the public interest in its prompt resolution *a fortiori* requires a decision on the merits irrespective of the effect or non-effect of that decision on the litigants (5 AM. Jur. 2d, Appeal and Error, §§ 762-765). In the instant case Sears seeks this Court's agreement that the refusal of the Tenth Circuit to permit it to appeal an adverse district court decision when the Board refused to do so violated due process of law. Sears claims to have been deprived of what Mr. Justice Brandeis described as basic to due process:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 84 (concurring opinion)).

Accordingly, in the face of the existence of a Constitutional question together with the general, legitimate and paramount public interest in the clear and proper unfolding of the requirements of the statute, the Regional Director's contention that this appeal is moot is untenable.

C. The Limited Applicability of Mootness to Proceedings Under the National Labor Relations Act.

As the earlier summary of the relevant facts in this case revealed, Respondent Union ceased its unlawful picketing approximately one week following the issuance of the Board's Decision and Order; however, the Union has not stated its intention to comply with the terms of that Order and has indicated that it may resume its picketing at any time.

In order that no assumption be indulged that the Union's temoporary cessation of its unlawful conduct renders this

appeal moot, and in order further to demonstrate courts' reluctance to apply the doctrine of mootness to cases involving the interpretation or application of the National Labor Relations Act, Sears advances the following additional principles and authorities.

In general, the cessation of picketing or other unlawful conduct under pressure of legal proceedings or pursuant to the result of such proceedings does not render a case moot.

In *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, this Court established the proposition that the cessation of unlawful conduct in compliance with an order of the Board does not render a case moot. Enforcement of that order was granted despite a prior settlement of the dispute.

This Court reaffirmed and extended that principle in *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *NLRB*, 357 U. S. 93, a case in which a union had engaged in an unlawful secondary boycott, had ceased such conduct subsequent to the filing of charges against them but prior to the issuance of a complaint by the Board's General Counsel, and had then settled the dispute by entering into a collective bargaining agreement containing an explicit pledge not to resume striking. This Court held that "the controversy was not rendered moot" under these facts; ". . . we cannot say that there was no danger of continued violation."

Courts of Appeals uniformly have followed these principles in a wide variety of factual contexts. In *NLRB* v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961), involving, as here, an unlawful secondary boycott, the Fourth Circuit held that:

> "Nor can we adopt the suggested dismissal of the petition as now presenting only an academic question inasmuch as the pickets have long since been withdrawn."

NLRB v. *Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 314 F. 2d 53 (CA 2, 1963), involved a situation where a Board's cease and desist order had expired prior to the Board's petition for enforcement. Nonetheless, the case was held not to be moot and the order was enforced since the Court's adjudicated concurrence with the Board's finding of a violation of law might be a relevant determination "with respect to subsequent picketing of the same general nature by the Union against the Company."[6]

Similarly in *NLRB* v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962), involving another secondary boycott, the Second Circuit held that:

> "Finally, termination of the picketing, the walkout and the particular job itself do not render the Board's order moot."

Decisions of the Sixth Circuit are to like effect, as in *NLRB* v. *Globe Wernicke Systems Company*, 336 F. 2d 589 (CA 6, 1964), in which the Court stated that:

> "Abandonment of an unfair labor practice does not cause the controversy to become moot."

In *NLRB* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963), the Seventh Circuit expressed its concern over the ever-present possibility of the resumption of discontinued unfair labor practices. In a case involving alleged unlawful conduct in connection with a first election after which a final and valid second election had been held, the Court stated:

> "Neither compliance with the Board's order, nor a subsequent certification of the union as bargaining representative renders the case moot . . . If the court

6. Respondent Union's threat to resume picketing, as expressed in its letter of June 26, 1969, as well as by implication of its general conduct in such cases, renders this rationale particularly apt in the instant case.

> makes no decision as to the Respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."

These principles have found expression in decisions of the Third Circuit, as in *Leeds & Northrup* v. *NLRB*, 357 F. 2d 627 (CA 3, 1966), and *NLRB* v. *Local 65, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 318 F. 2d 419 (CA 3, 1963): "Moreover, we do not regard the case as moot and the fact that there has been compliance with the Board's order does not militate against the injunction sought by it."

Thus the Supreme Court and Courts of Appeals throughout the Circuits have rejected the idea that Labor Act cases become moot when illegal acts are discontinued and disputes are settled after the judicial process has begun to function on those cases. This doctrine has applied to instances where the discontinuance occurs after the Board renders its decisions as well as before administrative complaint issues, it has applied to proceedings before the Board and proceedings before the courts of enforcement.

A very recent example of the approach taken by the Board in cases involving the issue of mootness where unfair labor practices have been discontinued and the underlying dispute has been settled in the course of litigation, appears in *Allied Industrial Workers of America*, 174 NLRB No. 61 (1969). In that case the Union discontinued its unlawful secondary picketing and executed a collective bargaining agreement with the employer subsequent to the Trial Examiner's finding that unfair labor practices had been committed. The Union and the employer jointly sought the withdrawal of proceedings prior to the Board's consideration of the Trial Examiner's decision on the ground that the matter had become settled and moot. In opposing such withdrawal, the Board's Gen-

eral Counsel argued that the violations which were committed were of a "serious and continuing nature," and that the execution of a labor agreement neither dissipated the effects of the unfair labor practice charges or obviated the need for a remedial order. The Board agreed with its General Counsel and denied the request to withdraw the charges. Surely, if the dispute in that case was not to be considered moot when even the aggrieved employer sought to terminate proceedings, then *a fortiori* it is not moot in the instant proceeding where Sears, fearing a possible resumption of unlawful picketing, continues to desire and to believe itself entitled to injunctive relief.

An appropriate conclusion to this section consists in a famous quotation from *NLRB* v. *General Motors Corp.*, 179 F. 2d 221 (CA 2, 1950), which summarizes the bases for rejecting the concept of mootness in the instant case as well as those which were discussed above:

> "The defendant in an action for an injunction never as a matter of right becomes entitled to a dismissal because after process served, he discontinues the conduct of which the plaintiff complains. It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily, that will not be a counterweight to the protection of which the plaintiff has shown he was once in need, and which he will need again should the defendant change his mind."

III. THE REGIONAL DIRECTOR'S RESPONSE TO THE MERITS OF SEARS' CONTENTIONS.

The Regional Director's Memorandum in opposition to Sears' Petition for a Writ of Certiorari herein fails to address itself to the merits of the arguments marshalled in support of the Petition both by Sears and by the *amici curiae*. Instead, the Regional Director adopts the reasoning and the result of the Tenth Circuit case which Sears seeks to review here. It is appropriate, therefore, to reply briefly to several of that court's contentions which the Regional Director supports and on which he relies, and to which Sears had not previously addressed itself:

1. In order to convey the impression that no inconsistency exists between the decision of the Tenth Circuit sought here to be reviewed and the decision of the Ninth Circuit in *Retail Clerks Union, Local 137, et al.* v. *Food Employers Council*, 351 F. 2d 525 (CA 9, 1965), the Tenth Circuit characterized the holding in *Retail Clerks* as being limited only to rights existing in injunction proceedings *in the district courts*. But this distinction is unsound since appellate review is an extension of the same cause litigated in the district court, rather than a new and separate action. *Marbury* v. *Madison*, 1 Cranch 137. Moreover, the Tenth Circuit's decision itself was predicated upon that court's view that Sears lacked standing to appeal because Section 10(l) did not accord charging parties the status of juridical parties *in the district court*.

2. The Tenth Circuit's view that Section 10(l) must be read "literally" would seem to require denying charging parties even the right to make oral argument or file briefs in proceedings under Section 10(l). Courts, including the Tenth Circuit, have not so construed the Act. However the courts have described the status of charging parties, it

seems clear that they have endeavored to accord them due process by permitting them an opportunity to be heard fully and effectively in proceedings involving their vital interests. Thus, the Ninth Circuit in *Retail Clerks* permitted the charging parties to make oral argument and file briefs in the appeal filed by the Board.[7] This assured them an adequate opportunity to protect and perfect their rights. How they were described is less important than the fact that their right to due process participation was recognized. In the Tenth Circuit's decision no such due process was accorded since, in the absence of an appeal by the Board and in view of the refusal to permit Sears to appeal, no forum was provided in which Sears could make argument, file briefs or otherwise be heard on the district court's erroneous failure to protect the rights conferred on Sears in Section 10(l).

3. The Tenth Circuit's reliance on the Norris-LaGuardia Act to justify denying Sears' standing to appeal the district court's failure to grant a *temporary* injunction fails to explain how aggrieved charging parties may obtain a *permanent* injunction under Section 10(f). If Norris-LaGuardia bars courts from granting injunctive relief—except on direct application *by the Board*—then it would seem that this bar would apply to all such relief, whether temporary or permanent. Yet Section 10(f) of the National Labor Relations Act clearly permits charging parties to obtain permanent injunctive relief. The Tenth Circuit's error consisted in its failure to give effect to Section 10(h) of the Act which removes the bar of Norris-LaGuardia in *all* proceedings under Section 10, including charging parties' appeal from both adverse final orders of the Board as well as adverse final orders of the district court.

7. Attached as Appendix "I", p. SA 41, is an official certification by the Clerk of the Ninth Circuit listing the parties who made argument and filed briefs in the *Retail Clerks* case.

4. Finally, the Tenth Circuit pronouncement that only those who were full juridical parties in the lower court may maintain an appeal is similarly incorrect. Without receding from our contention that charging parties do enjoy that status in the district court by virtue of Section 10(l), there exists clear and respected authority—made to and rejected by the Tenth Circuit—for the proposition that the nature of Sears' interests and involvement in the Section 10(l) proceedings permits an appeal irrespective of their label.

Pursuant to the second proviso of Section 10(l), the charging parties were entitled to and did receive notice of the filing of the petition for injunction in the district court, and they were entitled to and were accorded the right "to appear by counsel and present any relevant testimony".

Having taken advantage of these rights granted them by law, the charging parties are further entitled, as a matter of right, to seek review.

> "Where a statute gives an absolute right to be heard, which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal." 4 Moore, Federal Practices 104 (2d ed. 1963).

Under analogous Acts of Congress such right of appeal is present. For example, under Section 206 of the Chandler Act, 11 U. S. C. § 606, relating to bankruptcy proceedings, the debtor, the indenture trustees, and any creditor or stockholder of the debtor is granted the right "to be heard on all matters arising in a proceeding under this chapter". Although the persons mentioned are not formal parties, the quoted language has been construed as making these persons quasi-intervenors and thus authorizing appeals by them. *In re Keystone Realty Holding Co.*, 117 F. 2d 1003,

1005 (CA 3, 1941); accord, *Gleeson* v. *Carr*, 219 F. 2d 64, 67 (CA 9, 1955), cert. den. 350 U. S. 827 (1955); *Rogers* v. *Consolidated Rock Prods. Co.*, 114 F. 2d 108, 110 (CA 9, 1940), aff'd on other grounds, 312 U. S. 512 (1940); see *Young* v. *Higbee Co.*, 324 U. S. 204, 210.[8]

Having been accorded by Section 10(l) of the Act a quasi-intervenor or statutory-intervenor status below, the charging parties are entitled as of right to appeal a decision of the district court adverse to their interests.

IV. THE BRIEFS AMICI CURIAE IN SUPPORT OF SEARS' PETITION.

In supporting the instant Petition for a Writ Of Certiorari, the *amici*, representing hundreds of employers throughout the country, evidence the substantial public interest in the question presented for review and the widespread desire for its resolution by this Court.

Sears adopts the arguments and conclusions of both *amici* to the extent they raise new matters or expand upon others not fully covered in Sears' Petition.

With specific reference to the request of Terminal Freight Handling Company and Terminal Freight Cooperative Association, should this Court grant Sears' Petition, to delay oral argument pending the Third Circuit's decision in *Samoff* v. *International Association of Machin-*

8. Additional support for the proposition that those who may not have been formal parties in a lower court may nonetheless move independently to protect such of their rights as were involved in the litigation there derives by analogy from Rule 71 of the Federal Rules of Civil Procedure:

> "When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."

ists, District Lodge No. 1, Sears wishes to join in this request. Oral argument in the *Samoff* case is scheduled for October 24, 1969, so that no substantial delay is likely to result should that request be granted.

Moreover, should this Court be unpersuaded of the wisdom and need to grant Sears' Petition on the basis of the current posture of the case, Sears further requests that this Court delay its final judgment until after the Third Circuit renders its decision on the identical and related questions involved in *Samoff.*

Respectfully submitted:

GERARD C. SMETANA,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
KALVIN M. GROVE,
DONALD L. GIACOMINI.

SUPPLEMENTAL APPENDIX

APPENDIX A

PHILIP HORNBEIN, JR.
Attorney at Law
2007 Security Life Building
Denver, Colorado 80202

June 26, 1969

Mr. Francis Sperandeo, Regional Director
National Labor Relations Board
260 New Custom House
Denver, Colorado 80202

Re: Sears, Roebuck and Co.
Case No. 27-CC-278

Dear Mr. Sperandeo:

This will confirm my telephone conversation with Mr. Bruce Gillis on this date. I informed him that the Union has not yet decided whether or not to voluntarily comply with the Board's order, but that in the meantime all picketing of Sears will be discontinued.

I further advised Mr. Gillis that we will not resume picketing of Sears without first giving your office at least ten days notice in advance thereof.

Very truly yours,

s PHILIP HORNBEIN, JR.
Philip Hornbein, Jr.

PHjr/w

cc: Carpet Layers Local Union No. 419

APPENDIX B.

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
Washington, D. C. 20570

October 6, 1969

Mr. Gerard C. Smetana
Sears, Roebuck and Co.
Chicago, Illinois 60607

Re: Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO.
Case No. 27-CC-278

Dear Mr. Smetana:

This replies to your letter of September 29, 1969, requesting that Regional Director Francis Sperandeo receive written permission to furnish you with a copy of a letter to him from Mr. Phillip Horbein, attorney for Respondent Union.

I have concluded that your request should be granted and have accordingly authorized Mr. Sperandeo to furnish you with a copy.

Your very truly,

s/ ARNOLD ORDMAN
Arnold Ordman
General Counsel

cc: Francis Sperandeo

APPENDIX C.

SEARS, ROEBUCK AND CO.
Chicago, Illinois 60607
Phone 265-2500

Law Department

September 29, 1969

Messrs. Frank W. McCulloch, Chairman
Ogden Field, Executive Secretary
Arnold Ordman, General Counsel

National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

Re: Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO

and

Sears, Roebuck and Co.
176 NLRB No. 120
(Civil No. C-1052)

Gentlemen:

This letter constitutes a formal request, for written consent of the Board or the Chairman of the Board, or the General Counsel, for the production of a certain document, or information pursuant to Rule 102.118, and also a formal demand under Section 102.117 for purposes of inspection and copying of a certain document.

The document we seek and the reasons therefor are set forth in my letter of September 18, 1969, (copy attached herewith) to Francis Sperandeo, Esq. Regional Director,

Twenty-Seventh Region. By letter of September 23, 1969, (copy of which is also attached) W. Bruce Gillis, Acting Regional Director, refused to produce the letter described in my letter of September 18 on the grounds that it falls outside of Section 102. 126 and 102. 128 of the Board's Rules and Regulations dealing with ex parte communications "without the written consent of the Board or the Chairman of the Board . . . or the General Counsel . . . ".

In addition to the authorities cited in our letter of September 18, we would respectfully call your attention to the decision of Judge Mansfield, *Government Employees Insurance Company* v. *McLeod*, 69 LRRM 2186, 2189, in which the Board was directed to produce a document that was an ingredient in the decision-making process, after proper demand had been made.

For all of the foregoing reasons and those contained in our letter of September 18, we respectfully request either written consent so that the Regional Director will produce a copy of the Union's letter or production of the letter for purposes of inspection and copying.

Sincerely,

s/ GERARD C. SMETANA
Gerard C. Smetana

GCS: re

att.

cc: Francis Sperandeo, Esq. (w/o att.)
Philip Hornbein, Esq. (w/9/23/69 att.)

APPENDIX D.

NATIONAL LABOR RELATIONS BOARD
Region 27
260 New Custom House, 721 Nineteenth Street
Denver, Colorado 80202
Telephone 297-3551

Examiners and Attorneys
Telephone 297-3555

September 23, 1969

Sears, Roebuck and Company

Attention Gerard C. Smetana, Labor Relations Counsel
Chicago, Illinois 60607

Re: Carpet, Linoleum, Soft Tile and Resilient
Floor Covering Layers
(Sears, Roebuck and Co.)
Civil No. C-1052

Dear Mr. Smetana:

Our office yesterday received your letter dated September 18, 1969, requesting a copy of a certain letter received by our office from the Respondent Union in the above-captioned matter. I do not believe that under the Board's existing Rules and Regulations, we can send you a copy.

At the outset, I seriously dispute your contention that this letter constitutes an unauthorized ex parte communication within the intendment of "Sub Part P—Ex parte Communi-

cations" of the Board's Rules and Regulations, Section 102.126 and following; more specifically Section 102.128 defining the certain types of "on the record proceedings" involved clearly does not cover this situation.

As your request is not covered by the above, it falls within the general prohibitions of Subpart K, Section 102.118 of the Rules and Regulations which prohibits the production of such information as you request ". . . without the written consent of the Board or the Chairman of the Board . . . or the General Counsel . . . " whose addresses are National Labor Relations Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C., 20570. Accordingly, without such written consent, our office is unable to comply with your request.

Very truly yours,

s/ W. Bruce Gillis, Jr.
W. Bruce Gillis, Jr.
Acting Regional Director

APPENDIX E

Sears, Roebuck and Co.
Chicago, Illinois 60607
Phone 263-2300

Law Department

September 18, 1969

Francis Sperandeo, Esq.
Regional Director,
Twenty Seventh Region
National Labor Relations Board
Post New Custom House
Denver, Colorado

Re: Carpet, Linoleum, Soft Tile and
Resilient Floor Covering Layers
Local Union #419, AFL-CIO
and
Sears, Roebuck and Co.
126 NLRB No. 139 (Case No. 1-CA-)

Dear Mr. Sperandeo:

This letter constitutes a formal request by Sears, Roebuck and Co. for information from your files to which Sears believes it is entitled in connection with the captioned cases.

You will recall that in our recent conversation in your office on September 11, 1969 you confirmed my understanding that sometime subsequent to the issuance of the Board's Order in this case the Union, through its counsel, announced to you by letter its intention to resign for the

present its adjudicated unlawful picketing to give you ten (10) days notice should that picketing be resumed, and stated its indecision as to whether to appeal the Board's Order.

We hereby request a copy of the Union's letter.

In order to place the relevance of that letter in proper perspective, you will further recall the following background facts:

A. On August 29, 1968 pursuant to a charge filed by Sears protesting the Union's unlawful secondary picketing, your office petitioned the District Court for mandatory injunctive relief under Section 10(l) of the Act.

B. On October 4, 1968 the District Court refused to grant the requested injunctive relief. Sears then appealed this decision to the Tenth Circuit Court of Appeals.

C. On May 15, 1969 the Court of Appeals dismissed Sears' appeal on the ground that Sears lacked standing to prosecute it; the Court did not reach the merits of the dispute.

D. On June 20, 1969 the Board issued its decision finding that the Union had in fact engaged in the unlawful picketing as charged by Sears and as the Board's petition for injunctive relief had alleged.

E. The Union had continued its unlawful picketing throughout this entire period and even subsequent to the Board's Order.

F. On June 6, 1969 as a consequence of the Union's continuing picketing, Sears filed motions for a stay of mandate of the Tenth Circuit and for an injunction pending its appeal of the Tenth Circuit's decision.

G. At the time that Sears' afore-described motions were pending the Board conveyed both to counsel for

the Union and for Sears its intention to seek injunctive relief against the Union's violation of the Board's Order to cease the continuing unlawful picketing.

H: The Union's letter to which the instant request is addressed was received by you sometime between the date of the Board's Order, June 20, 1969 and the date of the Union's petition for review of that Order in the Court of Appeals for the District of Columbia Circuit on July 3, 1969. Further, this letter was written at a time when Sears' motion for interim injunctive relief was pending and when the Board was preparing independently to seek such relief under Section 10(e) of the Act.

Accordingly, the Union's letter had the effect of terminating or preventing the institution by the Board of projected proceedings in the District Court; it unilaterally affected the remedy to which Sears, as the aggrieved charging party, was entitled and would enjoy as a consequence of that suit; and it effectively undercut Sears' own pending motion for interim injunctive relief.

Under these circumstances, Sears believes that the Union's letter to which we refer constitutes an unauthorized ex parte communication within the meaning and spirit of the Public Information Act, 5 U. S. C. § 522 and Section 102.126 of the Board's Rules and Regulations. Although Section 102.128(e) of the Board's Rules appears to limit this doctrine to proceedings before Trial Examiners in cases pending before them, it is clear that the spirit and the very purpose of these Rules requires their extension to all stages of Board proceedings or of resulting court proceedings in which the communication in question has the effect, in the terms of Section 102.126, of "concerning the disposition on the merits of the substantive and procedural issues in the proceeding". Since, as we have noted,

the ex parte communication involved here had the effect of forestalling the institution of an action by the Board and also deprived Sears of a desired remedy available therein, the explicit condition for identifying "unauthorized" communications has been met. Sears therefore believes itself to be entitled to a copy of the Union's ex parte communication which achieved these objectives.

With respect to the question of extending the express language of the Board's rules in order to conform their purpose to the various situations in which they logically apply, we respectfully direct your attention to various Appellate Court decisions which have effected such extensions in keeping with the spirit of these Rules to enlarge the exchange of relevant information between interested parties. See, for example, *Harvey Aluminum* v. *NLRB*, 335 F. 2d 749 (CA 9, 1964); *NLRB* v. *Safeway Steel Scaffold Co.*, 383 F. 2d 749 (CA 9, 1964); *NLRB* v. *Safeway Steel Scaffold Co.*, 383 F. 2d 273 (CA 5, 1967), cert. den. 390 U. S. 955 (1968); *Palermo* v. *U. S.*, 360 U. S. 343 (1959), and *NLRB* v. *Borden Co.*, 392 F. 2d 412 (CA 5, 1968).

When Sears made an oral request to you on September 11, 1969, for a copy of the Union's letter, you indicated that you would not provide such a copy without the consent of the Union's counsel. That consent was not received. While you thus declined to furnish Sears with a copy of that letter, you did describe its contents, as has been detailed above. In a telephone conversation today, your office indicated a current intention to adhere to your prior decision. This formal request is written in the hope and expectation that upon further consideration, you will reverse that decision. However, if we do not receive a response from you by September 24, 1969, we shall assume that you continue to adhere to your prior refusals.

We should like to add that a copy of this letter is being forwarded to the Union, in accordance with the salutory principle that ex parte communications should be discouraged.

Your expeditious response to this formal request would be greatly appreciated.

Very truly yours,

/s/ Gerard C. Smetana,
Labor Relations Counsel,
Sears, Roebuck and Co.

GCS/sms

CC: Philip Hornbein, Esq.

APPENDIX F.

UNITED STATES DISTRICT COURT

For the District of Colorado.

FRANCIS SPERANDEO, Regional Director of the Twenty-Seventh Region, of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent.*	Civil No. C-1679.

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To the Honorable, the Judges of the United States District Court for the District of Colorado:

Comes Now Francis Sperandeo, Regional Director for the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l) of the National Labor Relations Act, as amended, 61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(l) (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pend-

ing before the Board on charges alleging, *inter alia*, that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. In support thereof, Petitioner, respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of the Court is invoked pursuant to Section 10(l) of the Act.

3. On or about July 24, 1969, B. H. Baker, Inc. (herein called Baker), pursuant to the provisions of the Act, filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. A copy of said charge is attached hereto as Exhibit A and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the said charge is true insofar as it alleges that Respondent has violated Section 8(b) (4) (i) (ii), subparagraph (B) of the Act, and that a complaint of the Board, based on said charge should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the mean-

ing of Section 2(5), 8(b), 8(c), and 10(l) of the Act, and has engaged in, and is engaging in, acts and conduct in violation of Section 8(b) (4) (i) (ii), subparagraph (B) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1129 16th Street, Denver, Colorado, and at all times material herein Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(c) At all times material herein George Cooney has been financial secretary and business manager of the Respondent, and Paul G. Wishard has been a field representative of Respondent.

(d) Baker, a Colorado corporation, is engaged at Colorado Springs, Colorado, as a contractor in the building and construction industry. In the course and conduct of its business, Baker annually receives goods and materials directly from outside the State of Colorado valued in excess of $50,000.

(e) At all times material herein, Baker has been engaged as a general contractor in the construction of a new addition to the USAF hospital, United States Air Force Academy, Colorado Springs, Colorado.

(f) In the construction of said hospital addition, Mascon, Inc. (herein called Mascon), has been engaged as a contractor to perform the masonry work; J. O. Veteto and Son, Inc. (herein called Veteto), has been engaged as a contractor

to perform lathing, plastering, and drywall work; and Whitney Electric Company (herein called Whitney) has been engaged as a contractor to perform the electrical work.

(g) Mo-Ham Carpet Cleaners, an individual proprietorship (herein called Mo-Ham), is engaged in Colorado, New Mexico, and Utah as a contractor for the United States Government in cutting, cleaning, and laying carpet. Mo-Ham maintains its principal office at Colorado Springs, Colorado.

(h) Baker, Mascon; Veteto, Whitney, and Mo-Ham are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act, or in an industry affecting commerce.

(i) At all times material herein, Mo-Ham has been engaged, pursuant to the above-described contract, in the installation of carpet on the third, fourth, and sixth floors of the library at the United States Air Force Academy, Colorado Springs, Colorado.

(j) Since on or about July 9, 1969, and at all times material herein, Respondent has been engaged in a labor dispute with Mo-Ham.

(k) In furtherance of its dispute with Mo-Ham, Respondent has picketed Mo-Ham while engaged in the performance of the work described in paragraph (i) above.

(l) At no time material herein has the Respondent been engaged in a labor dispute with the United States Air Force Academy (herein called the Academy), Baker, Mascon, Veteto, or Whitney.

(m) On or about August 1, 1969, the Academy reserved the north gate entrance to the Academy for the exclusive use of Mo-Ham and its employees and suppliers, and reserved the south gate entrance to the Academy for the exclusive use of Baker, Mascon, Veteto, Whitney, and all other employers and their respective employees and sup-

pliers who are performing work and services on the premises of the Academy.

(n) Notwithstanding the above separate gate designation, Respondent at all times since August 1, 1969, has continued to picket the south gate entrance to the Academy.

(o) As a result of Respondent's acts and conduct referred to in paragraph (n) above, employees of Baker, Mascon, Veteto, Whitney, and other persons engaged in commerce or in an industry affecting commerce, ceased working for their employers.

(p) By the acts and conduct set forth in paragraph (n) above, Respondent has engaged in, and has induced and encouraged individuals employed by Baker, Mascon, Veteto, Whitney, and other persons engaged in commerce or in industries affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and threatened, restrained, and coerced the United States Government, the Academy, Baker, Mascon, Veteto, Whitney, and other persons engaged in commerce or in industries affecting commerce.

(q) An object of the acts and conduct engaged in by Respondent, set forth in paragraph (n) above, was, and is, to force or require the United States Government, the Academy, Baker, Mascon, Veteto, Whitney, and other persons engaged in commerce or in industries affecting commerce, to cease doing business with Mo Ham.

6. It may be fairly anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraph (n) above, or similar or like acts and conduct in violation of Section 8(b) (4) (i) (ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper for the purposes of

effectuating the policies of the Act in accordance with the provisions of Section 10(l) therefore, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the south gate entrance to the Academy,

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given or made, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Baker, Mascon, Veteto, Whitney, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining the United States Government, the Academy, Baker, Mascon, Veteto, Whitney, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require the United States Government, the Academy,

Baker, Mascon, Veleto, Whitney, or any other person to cease doing business with Mo Ham.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 13th day of August, 1980.

/s/ Frances Speranzo
Frances Speranzo, Regional Director
National Labor Relations Board
Twenty Seventh Region
260 New Custom House
721 19th Street
Denver, Colorado 80202

Arnold Ordman,
General Counsel

Dominick L. Manoli,
Associate General Counsel

Julius G. Serot,
Assistant General Counsel

W. Bruce Gillis,
Regional Attorney, Region 27

/s/ Robert L. McCune
Board Attorney

/s/ Richard J. Wise
Board Attorney

National Labor Relations Board
Twenty Seventh Region
260 New Custom House
721 19th Street
Denver, Colorado 80202
297-3551

8-A21

Form Approved
Budget Bureau No. 44-R003.13

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 27-CC-321

Date Filed July 24, 1969

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name: CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL 419, AFL-CIO

b. Union Representative to Contact: George Cooney, Financial Secretary & Bus. Agent

c. Phone No.: 244-4884

d. Address (Street, city, State and ZIP code): 1129 - 15th Street, Denver, Colorado

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(D) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 21, 1969, the above-named labor organization, or its agents, engaged in, induced or encouraged the employees of B. H. Baker, Inc., Mascon, Inc., Consolidated Engineering, Inc., Nathkin & Company, Denver Acoustics, Inc., J. O. Vetter and Son, Inc., C. F. Long, Inc., Whitney Electric Company, and other persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform services, the object thereof being to force or require another employer, Moham Carpet Cleaners, to recognize or bargain with the above-named labor organization as the representative of Moham Carpet Cleaners' employees during a period of time when the above-named labor organization was not the certified bargaining agent as provided in Section 9 of the Act.

3. Name of Employer: B. H. BAKER, INC.

4. Location of Plant Involved (Street, city, State and ZIP code): P. O. Box 607, Colorado Springs, Colorado, 80901

5. Type of Establishment (Factory, mine, wholesaler, etc.): Construction Project

6. Identify Principal Product or Service: Building Construction

7. No. of Workers Employed: 20

8. Full Name of Party Filing Charge: B. H. BAKER, INC.

9. Address of Party Filing Charge (Street, city, State and ZIP code): P. O. Box 607, Colorado Springs, Colorado, 80901

10. Telephone No.: 473-3567

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ Agent
(Signature of representative or person making charge) (Title or office, if any)

Address: P. O. Box 607, Colorado Springs, Colorado — 473-3567 (Telephone number) — July 24, 1969 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Exhibit A

APPENDIX G.

UNITED STATES DISTRICT COURT

For the District of Colorado.

FRANCIS SPERANDEO, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner,* *vs.* CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, *Respondent.*	Civil No. C-1674.

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To the Honorable, the Judges of the United States District Court for the District of Colorado:

Comes Now Francis Sperandeo, Regional Director for the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l) of the National Labor Relations Act, as amended, 61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 160(l) (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on charges alleging, *inter alia,* that Respondent has engaged in, and is engaging in, acts and

conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of the Court is invoked pursuant to Section 10(l) of the Act.

3. On or about July 29, 1969, Sanders Carpets & Draperies, Inc. (herein called Sanders), pursuant to the provisions of the Act, filed a charge with the Board alleging, *inter alia,* that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. A copy of said charge is attached hereto as Exhibit A and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the said charge is true insofar as it alleges that Respondent has violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, and that a complaint of the Board, based on said charge should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5), 8(b), 8(e), and 10(l) of the Act, and has engaged in, and is engaging in, acts and

conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1129-15th Street, Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(c) At all times material herein George Cooney has been, financial secretary and business manager of the Respondent, and Paul G. Wishard and Richard Giesler have been, field representatives of Respondent.

(d) Sanders, a Colorado corporation, is engaged at 429 South Colorado Boulevard, Denver, Colorado, in the sale and distribution of carpets at retail. In the course and conduct of its business, Sanders annually distributes and sells annually within the State of Colorado, goods and materials and other merchandise having a gross value in excess of $500,000, of which goods and materials valued in excess of $50,000 are transported directly to the State of Colorado from points outside that State.

(e) At all times material herein, Sanders has not been engaged in business in the construction industry.

(f) At all times material herein, Sanders, in the course and conduct of its business, has subcontracted all of its carpet installation work and has employed no employees for the purposes of installing carpet.

(g) Sanders is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(h) James Leeman and Donald D. Goldtrap are engaged as a partnership in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Leeman and Goldtrap regularly provide services to Sanders, among others.

(i) On or about July 15, 1966, Respondent and Sanders executed a written agreement effective from July 1, 1966, until July 31, 1969, whereby Sanders agreed to give all of its floor covering work to a concern, or concerns, paying prevailing union wages and paying all fringe benefits as provided for in the Collective Bargaining Agreement entered into by Respondent and other floor covering employers. A copy of said Agreement is attached hereto and made a part hereof, as Exhibit B.

(j) At no time material herein has Respondent been the collective bargaining representative of any employees of Sanders.

(k) On or about July 28, 1969, Respondent demanded that Sanders enforce the above contract provisions that would require Sanders to give all of its floor covering work to a concern or concerns paying certain prevailing union wages and paying Union fringe benefits and to cease doing business with other persons who do not pay the specified rates and fringe benefits.

(l) Since on or about July 28, 1969, Respondent has attempted to force or require Sanders to cease using, selling, handling, transporting or otherwise dealing in the products of Goldtrap and Leeman, or to cease doing business with Goldtrap and Leeman.

(m) In furtherance of the aforesaid attempt to force or require Sanders to cease using, selling, handling, trans-

porting or otherwise dealing in the products of Goldtrap and Leeman, or to cease doing business with Goldtrap and Leeman, and in furtherance of the aforesaid attempt by Respondent to compel Sanders to enforce the aforementioned contract provisions, since on or about July 28, 1969, Respondent did authorize, establish, and maintain pickets at the premises of Sanders at its place of business at 429 South Colorado Boulevard, Denver, Colorado.

(n) By the acts and conduct set forth in subparagraphs (k), (l), and (m) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sanders to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained and coerced Sanders.

(o) An object of the acts and conduct engaged in by Respondent, set forth in paragraphs (k), (l), (m) and (n) above, was, and is, to force or require Sanders to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with the partnership of Goldtrap and Leeman.

6. It may be fairly anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (k), (l), (m), (n); and (o) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper for the purposes of effectuating the policies of the Act in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an Order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participating with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sanders or at locations where Sanders' products are being installed.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Sanders, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sanders, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Sanders or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with the partnership of Goldtrap and Leeman.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 12th day of August, 1969.

/s/ FRANCIS SPERANDEO,
Francis Sperandeo,
Regional Director
Twenty-Seventh Region
National Labor Relations Board

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

W. BRUCE GILLIS, JR.,
Regional Attorney, Region 27.

/s/ RICHARD J. WISE
Richard J. Wise,
Board Attorney

National Labor Relations Board
Twenty-Seventh Region
260 New Custom House, 721 - 19th Street
Denver, Colorado Telephone 297-3551

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

Witness my hand and Seal of said Court this 16th day of September 1967.

G. WALTER BOWMAN,
Clerk

By /s/ R. J. HALL,
Deputy

Form Approved
Budget Bureau No. 64-R303.17

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 27-CC-323

Date Filed July 29, 1969

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name: CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO

b. Union Representative to Contact:

c. Phone No.: 244-4884

d. Address (Street, city, State and ZIP code): 1129 Fifteenth Street, Denver, Colorado

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4) (B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 28, 1969, the above-named labor organization, by and through its officers, agents, and representatives, has induced and encouraged individuals employed by Sanders Carpet and Draperies, Inc. (hereinafter Sanders) to engage in a refusal in the course of their employment to perform services for said Sanders, and has threatened, restrained and coerced said Sanders, where in each case an object thereof was and is to force or require Sanders to cease doing business with Don Goldtrap.

3. Name of Employer: DON GOLDTRAP

4. Location of Plant Involved (Street, city, State and ZIP code): 1280 S. Zenobia Street, Denver, Colorado

5. Type of Establishment (Factory, mine, wholesaler, etc.): Retail Store

6. Identify Principal Product or Service: Carpets & Draperies

7. No. of Workers Employed: 9

8. Full Name of Party Filing Charge: SANDERS CARPETS AND DRAPERIES, INC.

9. Address of Party Filing Charge (Street, city, State and ZIP code): 470 South Colorado Blvd., Denver, Colorado

10. Telephone No.:

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ Secretary-Treasurer
(Signature of representative or person making charge) (Title or office, if any)

Address 470 South Colorado Blvd. Denver, Colorado (Telephone number) July 29, 1969 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Exhibit A

GPO 861-957

SA82

LOCAL No. 419

Affiliated with
Brotherhood of Painters, Decorators and Paperhangers of America

Denver, Colorado

We, SANDERS & SONS, INC. do hereby agree to give all of our floor covering work to a concern, or concerns, paying the prevailing wages as outlined below.

From July 1, 1966, to June 30, 1967, inclusive:
JOURNEYMAN $4.10 per hour
CARPET SEWER 2.82 per hour
APPRENTICES; first 6 months of apprenticeship 45% of journeyman wage rate.
second 6 months of apprenticeship 50% of journeyman wage rate.
third 6 months of apprenticeship 55% of journeyman wage rate.
fourth 6 months of apprenticeship 60% of journeyman wage rate.
fifth 6 months of apprenticeship 65% of journeyman wage rate.
sixth 6 months of apprenticeship 70% of journeyman wage rate.
seventh 6 months of apprenticeship 80% of journeyman wage rate.
eighth 6 months of apprenticeship 90% of journeyman wage rate.

From July 1, 1967, to December 31, 1967, inclusive:
JOURNEYMAN $4.20 per hour
CARPET SEWER 2.90 per hour
APPRENTICES; above percentages based on current journeyman wage rate.

From January 1, 1968, to June 30, 1968, inclusive:
JOURNEYMAN $4.30 per hour
CARPET SEWER 2.98 per hour
APPRENTICES; above percentages based on current journeyman wage rate.

From July 1, 1968, to December 31, 1968, inclusive:
JOURNEYMAN $4.45 per hour
CARPET SEWER 3.06 per hour
APPRENTICES; above percentages based on current journeyman wage rate.

From January 1, 1969 to July 31, 1969, inclusive:
JOURNEYMAN $4.60 per hour
CARPET SEWER 3.15 per hour
APPRENTICES; above percentages based on current journeyman wage rate.

All classifications shall receive 2% or more vacation pay in accordance with the Collective Bargaining Agreement entered into by CARPET, LINOLEUM AND RESILIENT TILE LAYERS, LOCAL UNION NO. 419, and the Employers in the floor covering industry doing business within the geographical area within the jurisdiction of said Union, as of July 1, 1966, and all classifications shall receive all other fringe benefits covered by said Collective Bargaining Agreement.

Full time _____ day of _____, 1966.

CARPET, LINOLEUM AND RESILIENT TILE LAYERS
LOCAL UNION NO. 419

By _____

Employer

By _____

Exhibit B

STATE OF COLORADO
CITY AND
COUNTY OF DENVER } ss.

I, Francis Sperandeo, being first duly sworn depose and say that I am Regional Director of the Twenty-Seventh Region of the National Labor Relations Board; that I have read the foregoing petition and exhibit and know the contents thereof; that the statements therein made as upon personal knowledge are true and those made as upon information and belief, I believe to be true.

/s/ FRANCIS SPERANDEO
Francis Sperandeo

Subscribed and sworn to before me this 12th day of August, 1969.

/s/ EDITH M. STEPHENS
Edith M. Stephens
Notary Public.

(SEAL)

My commission expires September 14, 1969.

conduct in violation of Section 8(b)(7), subparagraph (C) of the Act, affecting commerce within the meaning of Sections 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) At all times material herein, George Cooney has been financial secretary of Respondent, Paul Wishard has been Business Representative of Respondent, and Billy Vice has been an employee and agent of Respondent.

(c) Respondent maintains its principal office at Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(d) Aristocraft is engaged at Denver, Colorado, in the sale and installation of floor covering and tile. During the last twelve months, which period is representative of all times material herein, Aristocraft, in the course and conduct of its business operations, received goods and materials valued in excess of $7,000 at its Denver, Colorado, operation, directly from points outside the State of Colorado; and received goods and materials valued in excess of $50,000 at its Denver, Colorado, operation from other enterprises, including *inter alia,* William Volker & Company, Larson Distributing Company, Western Applicance Corp., Wholesale Flooring, Inc., Wholesale Ceramic Tile, Inc., and Downs Supply Co., all of Denver, Colorado, which other enterprises had received the said goods and materials directly from points outside the State of Colorado.

(e) Respondent is not currently certified as the representative of any of Aristocraft's employees.

(f) No charge has been filed with the Board under Section 8(a)(2) of the Act alleging that Aristocraft has unlawfully recognized, or assisted any labor organization.

(g) Notwithstanding the aforesaid, Respondent, since on or about August 8, 1967, has demanded that Aristocraft recognize and bargain with Respondent as the representative of Aristocraft's floor covering and tile installation employees, and Respondent has been attempting to compel Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative.

(h) In furtherance of the aforesaid demand for recognition and bargaining and attempt to compel Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative, Respondent, at all times material since on or about December 7, 1967 (excluding the period from January 3 to January 8, 1968), has picketed Aristocraft at various of Aristocraft's job installation sites in Denver, Colorado.

(i) An object of Respondent's picketing set forth in subparagraph (h) above, is to force or require Aristocraft to recognize or bargain with Respondent as the representative of Aristocraft's floor covering and tile installation employees, and to force or require Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative notwithstanding that Respondent is not currently certified as a representative of such employees.

(j) Respondent engaged in the activity set forth in paragraph 5, subparagraphs (h) and (i) above notwithstanding that no valid petition under Section 9(c) of the Act involving employees of the Employer has been filed within a reasonable period of time from the commencement of such picketing.

(k) It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts set forth in paragraph 5, subparagraphs (h) and (i) above or similar or like acts and conduct in violation of Section 8(b)(7), subparagraph (C), of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue, enjoining and restraining Respondent, its officers, agents, servants, employees, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Continuing their current picketing of Aristocraft, where an object thereof is to force or require Aristocraft to recognize or bargain with Respondent, or any other labor organization, as the representative of Aristocraft's floor covering and tile installation employees, or to force or require Aristocraft's employees to accept or select Respondent, or any other labor organization, as their collective bargaining representative until the Board determines that a question concerning representation of Aristocraft's employees may appropriately be raised under Section 9 of the Act.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 23rd day of January, 1968.

/s/ CLYDE F. WAERS
Clyde F. Waers,
Regional Director
National Labor Relations Board
Twenty-Seventh Region
260 New Custom House
721—19th Street
Denver, Colorado 80202

ARNOLD ORDMAN,
General Counsel

DOMINICK L. MANOLI,
Associate General Counsel

JULIUS G. SEROT,
Assistant General Counsel

FRANCIS SPERANDEO,
Regional Attorney, Region 27

W. BRUCE GILLIS, JR.,
Attorney

RICHARD J. WISE,
Attorney

National Labor Relations Board
Twenty-Seventh Region
260 New Custom House
721—19th Street
Denver, Colorado 80202
Telephone No. 297-3551

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

Witness my hand and Seal of said Court this 16th day of Sept. 1969.

G. WALTER BOWMAN,

Clerk

By /s/ R. J. HALL,

Deputy.

Exhibit 1

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 27-CP-39

Date Filed January 2, 1968

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name: CARPET, LINOLEUM AND RESILIENT TILE LAYERS LOCAL UNION NO. 419

b. Union Representative to Contact: George A. Cooney

c. Phone No.: 244-4884

d. Address (Street, city, State and ZIP code): 1129 - 15th Street, Denver, Colorado 80202

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (7) (c) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about August 5, 1967, and intermittently thereafter, particularly since December 8, 1967, and continuing to date, the above-named labor organization, by and through its officers, agents, and representatives, has picketed, and caused to be picketed, Aristocraft Counter and Floor Covering, Inc. (hereinafter Aristocraft), where an object thereof is to force or require said Aristocraft to recognize or bargain with the above-named labor organization as the representative of its employees, or to force or require the employees of said Aristocraft to accept or select said labor organization as their collective bargaining representative, where said collective bargaining representative is not currently certified as representative of said employees.

By the above and by other acts and conduct, the above-named labor organization has restrained and coerced employees in the exercise of rights guaranteed under Section 7 of the Act.

3. Name of Employer: ARISTOCRAFT COUNTER AND FLOOR COVERING, INC.

4. Location of Plant Involved (Street, city, State and ZIP code): 6805 Leetsdale Drive Denver, Colorado

5. Type of Establishment (Factory, mine, wholesaler, etc.): Floor shop

6. Identify Principal Product or Service: Floor covering and tile laying

7. No. of Workers Employed: 8

8. Full Name of Party Filing Charge: ARISTOCRAFT COUNTER AND FLOOR COVERING, INC.

9. Address of Party Filing Charge (Street, city, State and ZIP code): 6805 Leetsdale Drive Denver, Colorado

10. Telephone No.: 388-6485

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Robert R. Rice (Signature of representative or person making charge) — President (Title or office, if any)

Address 6805 Leetsdale Drive, Denver, Colo. — 388-6485 (Telephone number) — January 2, 1968 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

COPY

GPO 911-397

APPENDIX I.

September 13, 1963.

Before Judges Barnes & Jertberg, *CCJ.* & Stephens, *DJ.*

18350 *The Frito Company, Western Division* v. *N. L. R. B.*

Petition to review & petition to enforce argued by Mr. Harvey Letter, Atty. for the NLRB, for the board; by Mr. Carl M. Gould for amicus curiae Reach Merchandising & for the Frito Co.; by Mr. Kenneth M. Schwartz for Retail Clerk's 770 and by Mr. William B. Irvin for Retail Clerk's Nos. 899, et al.; and by Mr. Joseph M. McLaughlin for intervenors Alpha Beta Foods et al.

September 8, 1965.

Before Judges Barnes, Hamlin & Merrill, *CJJ.*

20201 Retail Clerks Union Local No. 173, et al. and Ralph E. Kennedy, Regional Director, *NLRB* v. *Food Employers Council, Inc., et al.*

Mr. Kenneth Schwartz argued for the appellants; Mr. Frank H. Itkin, Atty. for the NLRB, argued for the board; Mr. Charles Hackler argued for the *amicus curiae* Joint Council & American Research; Mr. Joseph M. McLaughlin present for the appellees but did not argue.

I certify that the above is a listing of counsel who argued in the two above matters.

Attest my hand and the seal of the said the United State Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of October, 1969.

WILLIAM B. LUCK, *Clerk,*
by RAYMOND D. HEWITT, *Deputy.*

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 2 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

AND

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE PETITIONER.

BRICE I. BISHOP,
PHIL B. HAMMOND,
Suite 420,
1819 H Street N. W.,
Washington, D. C.,
Attorneys for American Retail Federation as Amicus Curiae.

SHIMMEL, HILL & BISHOP,
Suite 420,
1819 H Street N. W.,
Washington, D. C.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

AND

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

vs.

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE PETITIONER.

INTEREST OF THE AMICUS CURIAE.

The American Retail Federation (hereinafter referred to as the "Federation"), is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation has previously appeared as an *amicus curiae* in support of the Petition for Writ of Certiorari in the instant case. In addition, it has appeared as *amicus curiae* before this Court in other labor relations matters which have affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved: the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriateness of state courts granting injunctive relief in cases of shopping center picketing;[2] and the Board's lack of authority to compel employers to bargain based on Union authorization cards unless the conduct of a fair election is impossible.[3]

The subject matter of the instant case—the unwarranted and prejudicial deprivation of rights of an employer in judicial proceedings for temporary injunctive relief from

1. Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America*, 390 U. S. 254 (1968).

2. Brief *Amicus Curiae* in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc., and Weis Markets, Inc.*, 391 U. S. 308 (1968).

3. Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB*, 395 U. S. 575 (1969); and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.*, 395 U. S. 575 (1969).

secondary boycotts—is a matter of substantial concern to the Federation.[4] In 1947 and 1959, Congress sought to protect neutral bystanders from becoming embroiled in the labor disputes of others by enacting the Taft-Hartley and Landrum-Griffin amendments to the National Labor Relations Act.[5] Notwithstanding this legislation, however,

4. The Federation has frequently called to the attention of Congress its views on the subject of secondary boycotts. *E.g., Hearings Before the Special Committee on Labor, Committee on Education and Labor, on H. R. 11725*, House, 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on the Separation of Powers, Committee on the Judiciary, on Congressional Oversight of Administrative Agencies (NLRB)*, Senate, 90th Cong., 2nd Sess. (1968). Similarly, the Federation has presented its position on other matters involving the administration of the Act to both Congress and this Court. *E.g., Hearings Before the Subcommittee on Labor, Committee on Labor and Public Welfare, on S. 256, Senate*, 89th Cong., 1st Sess. (1965); *Hearings Before the Subcommittee on Labor, Committee on Education and Labor, on H. R. 77, H. R. 4350 and Similar Bills*, House, 89th Cong., 1st Sess. (1965).

5. The floor debates which now form the legislative history of the 1959 Landrum-Griffin amendment to the Act thus reflect a primary concern to protect neutral employers such as the Petitioner from secondary boycotts. The debates are replete with statements such as those by:

Senator Curtis:

"Some of the most flagrant practices of labor racketeers are made possible by the inadequacy of the existing secondary boycott provisions."

Senator Goldwater:

"If we do not prohibit secondary boycotts, as was intended by the Taft-Hartley Act; if we allow blackmail picketing to continue, we shall not have an effective labor bill."

Senator Morse:

"The Landrum-Griffin bill was intended to be an effective and efficient instrument for closing the (secondary boycott) loopholes about which employers have rightly complained."

Senator Ervin:

"There is a need for a clarification of the law affecting secondary boycotts; indeed there is a crying need for such legislation."

Senator Dirksen:

"I want (secondary boycotts) stopped. So does America."

II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

many unions continue to resort to unlawful secondary conduct to achieve their goals.[6] Retail establishments, in particular, have frequently fallen prey to such tactics.[7] With the concomitant remedial limitations placed upon picketing arguably subject to relief under Section 10(l),[8] employers more than ever find that Section 10(l) affords the only remedy to proscribe peaceful picketing.[9]

This case raises, therefore, recurrent and important questions of first impression involving an area of vital interest to the retail industry and all employers. The injunctive protection afforded by Section 10(l) of the Act extends to secondary boycotts as well as unlawful union recognitional

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6. Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *82 per cent, or nearly 3700 charges*, involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board*, p. 218 (1967); *Summary of Operations of NLRB General Counsel*, reprinted in 70 LRR 459 at 468 (1969). In the event that the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) of the Act to petition a United States District Court for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

7. See, *e.g.*, the factual situations involved in *N. L. R. B.* v. *Local 25, I. B. E. W.*, 351 F. 2d 593 (2d Cir. 1965); *N. L. R. B.* v. *Building Service Employees*, 376 F. 2d 131 (1st Cir. 1967); *Local 140, Furniture Workers* v. *N. L. R. B.*, 390 F. 2d 495, (2nd Cir. 1966); *Honolulu Typographical Union* v. *N. L. R. B.*, 401 F. 2d 952 (D. C. Cir. 1968); *Hoffman* v. *Typographical Union, Local 37*, 243 F. Supp. 790 (D. C. Hawaii 1965); *Squillacote* v. *Building Trades Council*, 266 F. Supp. 971 (E. D. Wisc. 1967); *Penello* v. *Drivers Local 639*, ... F. Supp. ....., 68 LRRM 2222 (D. C. 1968); *Roywood Corp.* v. *Technicians*, 290 F. Supp. 1008 (S. D. Ala. 1968); *Local 1238, Carpet, Linoleum & Soft Tile Layers*, 160 NLRB No. 39 (1966); *Columbus Building & Trade Council*, 164 NLRB No. 79 (1967); *Milk Wagon Drivers, Local 753*, 164 NLRB No. 116 (1967); *Teamsters, Local 294*, 173 NLRB No. 234 (1969).

8. II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

9. *Amalagamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc. and Weis Markets, Inc.*, 391 U. S. 308 (1968).

picketing and improper "hot-cargo" agreements.[10] A District Court ordered temporary injunction[11] is the only bulwark available to employers subjected to such unlawful union pressures.[12] A dilution of this protection, such as that which will be occasioned by the decision below, fosters the very industrial strife the Act was designed to prevent and may mean enforced capitulation by employers who are denied access to state courts under preemption doctrines

10. The number of unfair labor practice charges alleging union recognitional picketing in violation of Section 8(b)(7) has been increasing substantially. Between NLRB fiscal years 1966 and 1967, for example, the number of such charges rose 39 percent. *Thirty-second Annual Report of the National Labor Relations Board, supra* at 218; *Thirty-first Annual Report of the National Labor Relations Board*, p. 186 (1966). As in the case of charges alleging unlawful secondary boycotts, if the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) to petition for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

11. Injunctive relief under Section 10(l) is designed to provide interim relief until a permanent injunction is obtained under Section 10(e) or (f). If the decision of the Tenth Circuit in the instant case is allowed to stand, however, a successful employer before the Board would be placed in the anomalous position of, on the one hand, having a participatory right to obtain permanent injunctive relief under *United Automobile Workers* v. *Scofield*, 382 U. S. 250 (1965), but yet, conversely, having no participatory right to obtain Section 10(l) interim relief during the protracted course of unremedied picketing.

12. The protection afforded to an employer from unlawful picketing through a Board initiated action for a permanent injunction is more illusory than real. The length of time required for the Board to issue a complaint; for the Board Trial Examiner and the Board itself to rule on the complaint and for a Court of Appeals then to enforce any resultant Board order largely negates the value to the picketed employer of such a proceeding. In the instant case, for example, the Union commenced its picketing of Sears on August 7, 1968 and the picketing still continued after the Board order of June 20, 1969. See Motion for Injunction Pending Appeal, Record, page 14, *et seq*. A petition in the Court of Appeals to review the Board's order finding that such picketing was unlawful (*Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO* v. *National Labor Relations Board*, C. A. D. C. No. 23223, filed July 3, 1969) has not yet been argued.

and who have now been denied relief in the only forum left available to them.

Such a paradoxical result is also at odds with the Constitutional requirements of fairness and procedural due process which permeate all valid Congressional enactments. And finally, the decision below sharply conflicts with the expanding awareness of other courts to the essential rights of Board charging parties to participate in proceedings governing their essential interests.

ARGUMENT.

I.

THE DECISION BELOW INFRINGES ON THE RIGHT OF CHARGING PARTIES TO PROCEDURAL FAIRNESS AND DUE PROCESS.

This Court has determined that "both the successful charged party (in Scofield) and the successful charging party (in Fafnir) have a right to intervene in the Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Automobile Workers* v. *Scofield*, 382 U. S. 250, 208 (1965). It has not, however, determined the corollary and equally-important extent to which charging parties either may participate in proceedings by the Board for temporary injunctive relief or may participate in subsequent appellate review of such proceedings. Left unanswered by the Court, therefore, are such significant issues as the rights of charging parties to participate as "parties" in such District Court proceedings;[13] to obtain relief from the District Court when the Board chooses not to pursue its petition;[14] to prosecute an appeal from an adverse District

13. This question is presently pending before the Court of Appeals for the Third Circuit in *Samoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, Nos. 17,907 and 17,910, where the District Court, notwithstanding the express rights of participation accorded charging parties by Section 10(l), nevertheless ruled that the charging parties there involved did not constitute "parties" and, accordingly, lacked standing to object to a proffered Board stipulation.

14. See *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965), in which case the Ninth Circuit affirmed the issuance of an injunction under Section 10(l), at the urging of the charging party and over the objection of the Board Regional Director, where the charging party "merely supported the original petition for injunctive relief requested by the Regional Director."

Court decision when, as in the instant case, the Board declines to do so; to participate as a party or intervene in appellate proceedings before the Courts of Appeals;[15] or to file a petition for certiorari before this Court.[16] The paramount considerations of procedural fairness and due process require that these rights also be accorded to charging parties.

It is axiomatic that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967), quoting *Rusk* v. *Cort*, 369 U. S. 367, 380 (1962). As Mr. Justice Brandeis observed in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 84 (1935) (concurring opinion):

"The supremacy of law demands that there shall be

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15. The Ninth Circuit has declined to allow a *successful* charging party to intervene in an appeal from the granting of a 10(l) injunction (*San Francisco-Oakland Newspaper Guild* v. *Kennedy*, ... F. 2d ...., 69 LRRM 2535 (1969), *cert. den.* .... U. S. ...., 69 LRRM 2537 (1968)) while the Second and Sixth Circuits have, conversely, apparently permitted such intervention. *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (2nd Cir. 1966); *N. L. R. B.* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir. 1967).

16. Only if the charging party is accorded the status of a "party" or "intervenor" in the Court of Appeals, as permitted by the decisions of the Second and Sixth Circuits noted in the preceding footnote, may he seek certiorari from an adverse decision of the Court of Appeals. *United Automobile Workers* v. *Scofield*, *supra at* 214. The importance of the right to petition for certiorari is underscored by this Court's decision in *United Steelworkers* v. *NLRB*, 376 U. S. 492 (1963). In that case, the charged union, which had been cleared of a Section 8(b)(4) charge by the Board, was found by the Second Circuit to have violated the Act. The union, which had been allowed intervention in the Court of Appeals, sought and obtained certiorari when the Board declined to file such a petition. On the merits, this Court then unanimously reversed the Second Circuit. Had the charged party, or a charging party in the converse but analogous situation here involved, not been accorded intervention rights, there would have been no opportunity for this Court's remedial review.

> opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."

The legislative history of Section 10(l), as well as its express language, reveals that Congress did not intend to preclude charging parties' access to judicial review. Section 10(l) was, in effect, a compromise between the House bill, as well as the Ball amendment in the Senate, which would have permitted private parties to direct the conduct of their own injunction proceedings[17] and the opposition to such proposals which would have precluded employers from independently choosing the forum, selecting the theories of violation and relief and actually initiating such suits.[18] The result was that Section 10(l) was intended to accommodate both "public" and "private" interests. Private parties were provided with both a meaningful remedy—injunctive relief—and a right of full participation once a mandatory injunction suit has been commenced before the Board. In addition, Section 10 (h) was enacted to exempt from the Norris-LaGuardia Act *all* federal court proceedings authorized by Section 10 of the Act, including both the review and enforcement proceedings involved in *Scofield* and the 10(l) proceedings here involved.[19]

17. The House Bill provided for 10(l) injunctions at the instance of private parties rather than the Board, and the Ball amendment similarly permitted private parties "to control [their] own litigation . . . [rather than permit] some official of the Board . . . [to] decide whether in his discretion, rather than in the discretion of the man who claims to be injured, the litigation should be filed." *Legislative History of the Labor Management Relations Act*, 1947, pp. 561, 1353.

18. See, *e.g.*, *Legislative History of the Labor Management Relations Act*, 1947, pp. 1057-8, 1347-70.

19. The decision below presupposes a conflict between the grant of appellate rights to a charging party and the prohibitions of the Norris-LaGuardia Act. But participation by the charging party in *Scofield*—where the scope of the injunctive relief was permanent

The Congressional objective of full participation by a charging party, once the Board has initiated a 10(l) suit, sharply conflicts with foreclosing the access of charging parties to judicial review. It is no answer to such denial to argue that the right to appeal from an erroneous District Court decision is precluded because the statutory language only mentions the right "to appear by counsel and present any relevant testimony."[20] The right to full participation in the initial stages of an adjudicatory proceeding necessarily implies the opportunity to invoke and participate in appellate judicial review.[21] This Court in *Scofield* recognized that the statutory design interblends public and private rights and that considerations of procedural fairness and due process, as well as Congressional intent, require that intervention rights be accorded to *successful* charging parties in Board enforcement proceedings. The same considerations also require that *unsuccessful* charging parties in 10(l) proceedings be granted similar rights, particularly where, unless accorded such rights, they will have no effective recourse available to protect their vital interests.[22]

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rather than temporary as in a 10(l) proceeding and the risk of potential conflict, accordingly, all the more serious—did not conflict with the Norris-LaGuardia Act for the same reason that such participation in this case does not. Section 10(h), which removes *all* Section 10 proceedings from the limitations of the Norris-LaGuardia Act, uniformly applies to a 10(l) proceeding as well as to a 10(e) review proceeding.

20. This same argument was rejected in *Scofield* where this Court found that the absence of specific language providing for intervention in Section 10(f) review proceedings did not indicate that Congress intended to preclude such intervention. 382 U. S. at 209-10.

21. *Cf., e.g., Griffin* v. *Illinois*, 351 U. S. 12 (1955); *Douglas* v. *California*, 372 U. S. 353 (1962); *Lane* v. *Brown*, 372 U. S. 477 (1962).

22. The eventual determination of the merits of the charge, as Congress recognized when it enacted Section 10(l), fails to provide a practical remedy for the employer faced with injurious unlawful picketing. See footnote 6, *supra*. Moreover, as in the instant

II.

THE DECISION BELOW CONFLICTS WITH THE RECOGNITION ACCORDED BY OTHER COURTS TO THE FUNDAMENTAL RIGHT OF BOARD CHARGING PARTIES TO PARTICIPATE IN PROCEEDINGS GOVERNING THEIR ESSENTIAL INTERESTS.

This Court's decision in *Scofield* recognized the legitimate role of charging parties in judicial proceedings arising from their charges, a role which "will not impair effective discharge of [the Board's] duties and may well promote the public interest." Such participation permits "all relevant material" to be brought to the attention of the appellate court, makes for "more meaningful" briefs and, of perhaps particular relevance to the instant case, guarantees "that the Board interpretation of the relevant provisions accords with the intent of Congress," 382 U. S. at 215, 219.

The Board has similarly acknowledged that participation by charging parties in 10(l) proceedings serves the public interest:

> "Section 10(l) of the Act . . . provides for the participation of the charging party in the injunction action. A record has not yet been made, and the participation

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case, participation in a much later enforcement proceeding is clearly no substitute for participation in the 10(l) proceeding nor will it in any way suffice to protect the substantial interests of the charging party involved therein. *Cf. Ashbacker Radio Corp.* v. *F. C. C.*, 326 U. S. 327 (1946). The problem is amply illustrated in the instant case where the District Court Judge, believing that the General Counsel would lose his case before the Board, refused to grant the injunction. This opinion of the case, however, was not at any time shared by the Board which later found that the Union had engaged in an unlawful secondary boycott. Thus, though it was ultimately determined that the employer had been wronged, he was precluded from obtaining the statutory remedy to which he is entitled in Section 10(l) of the Act by the Circuit Court's refusal to grant him standing to appeal the District Court's erroneous decision. Few other retailers could have withstood the picketing which thereafter resulted for almost a year.

> of the charging party may be helpful in the development of it." Brief for the National Labor Relations Board in *United Automobile Workers* v. *Scofield, supra* at p. 19, n. 13.

The *Scofield* decision also recognized that participation by charging parties in judicial proceedings is necessary to protect their rights when the Board reevaluates its position during the pendency of a case. In such a situation, the Board General Counsel "cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine which the Board itself has abandoned." 382 U. S. at 215, n. 7.

These considerations are all the more pertinent where the Board, as in the present case, declines to seek appellate review for reasons which may be wholly unrelated to the merits of the controversy. Access to such review by the charging party then becomes fundamental to the protection of both the vital private and public interests involved. As Professor Jaffe observed:

> "The union [in *Scofield*] suggested that if allowed to intervene it could seek Supreme Court review of an adverse decision though the Board were indifferent or opposed. And why not? *If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling?* I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. *But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection.*" Jaffe, Judicial Control of Administrative Action, p. 545 (1965) (emphasis supplied; footnote omitted).

A failure to appreciate the "central interest" of the charging party, and a concomitant idolatry of the Norris-LaGuardia Act, are the hallmarks of the decision below.

The decision therefore collides with the teachings of this Court in *Scofield*. It is contrary to the intervention rights permitted charging parties by the Second and Sixth Circuits[23] and the expanding rights of charging parties generally recognized by the Third Circuit,[24] the Board itself[25] and Congress.[26] It also conflicts with *Houston Insulation Contractors Association* v. *NLRB*, 339 F. 2d 868 (5th Cir. 1964), where, *at the instance of the charging party and over the objection of the Board*, the Fifth Circuit stayed a

23. *McLeod* v. *General Electric Co., supra; NLRB* v. *Nashville Building & Construction Trades Council; supra.*

24. *Leeds and Northup* v. *NLRB*, 357 F. 2d 627 (3rd Cir. 1966).

25. See, *e.g., Spector Freight System, Inc.*, 141 NLRB 1110 (1963). In addition, the Board's Rules and Regulations provide that "parties", which are expressly defined to include "any party filing a charge", are permitted during Board hearings to "call, examine, and cross-examine witnesses . . . to introduce evidence into the record . . . [and to] submit briefs, engage in oral argument, and submit proposed findings and conclusions . . ." Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Series 8, as amended, Secs. 102.8 and 101.10 (1968). The retention of these provisions, despite a recommendation by an external investigating committee that charging parties not be designated as "parties" before the Board, clearly signifies that the Board considers full participation by charging parties to be administratively desirable. Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. Chi. L. Rev. 786, 791, n. 33 (1965).

26. This Court in *Scofield*, for example, found "helpful analogies" in the Judicial Review Act of 1950, 5 U. S. C. §§ 1031-42 at § 1038, and the then-existing provisions of Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a)(2) has subsequently been amended to offer an even more compelling analogy in support of the charging parties' right to intervene:

> "*Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Board order and continued in effect a 10(l) injunction.[27] And it is diametrically opposed to the construction of Section 10(l) by the Ninth Circuit in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra,* which emphasized the critical distinction between a charging party independently petitioning for injunctive relief, or seeking relief different from that sought by the Regional Director, and the charging party merely supporting the Board's original petition for injunctive relief. In the latter case, that court, in marked contrast to the court below, found no inconsistency "in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."

CONCLUSION.

For the foregoing reasons, the Federation urges that the decision of the court below be reversed.

Respectfully submitted,

BRICE I. BISHOP,
PHIL B. HAMMOND,
Suite 420,
1819 H Street N. W.,
Washington, D. C.,
Attorneys for American Retail Federation as Amicus Curiae.

SHIMMEL, HILL & BISHOP,
Suite 420,
1819 H. Street N. W.,
Washington, D. C.,
Of Counsel.

27. The main thesis of the dissent in *Houston Insulation* was that, by virtue of the Norris-LaGuardia Act, the court lacked jurisdiction "to grant the private petitioner's motion for stay and thereby to reinstate the [10(l)] injunction or continue it in force." It thus mirrors closely the decision below and highlights the erroneous view of the Tenth Circuit herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,
Petitioner,
vs.
CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,
AND
FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF TERMINAL FREIGHT HANDLING COMPANY, AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION.

JERRY KRONENBERG,
BOROVSKY, EHRLICH & KRONENBERG,
111 West Washington Street,
Chicago, Illinois 60602,
JOHN W. PELINO,
PELINO, WASSERSTROM & CHUCAS,
Architects Building,
17th and Sansom Streets,
Philadelphia, Pennsylvania 19103,
CHARLES C. KIEFFER,
KIEFFER & MORONEY,
1875 Connecticut Avenue, N. W.,
Washington, D. C. 20009,
Attorneys for Terminal Freight Handling Company and Terminal Freight Cooperative Association.

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BRIEF AMICUS CURIAE ON BEHALF OF TERMINAL FREIGHT HANDLING COMPANY, AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION.

INTEREST OF THE AMICI CURIAE.*

Terminal Freight Handling Company and Terminal Freight Cooperative Association (also herein called "Company" and "Association", respectively), were appellants in a case decided on December 18, 1969 by the Third Cir-

* This brief is filed with the written consent of all parties.

cuit Court of Appeals[1] which involved the same general question as that presented in the instant appeal relating to the rights and status of charging parties in proceedings under Section 10(l) of the National Labor Relations Act.[2]

The Association is a non-profit organization, consisting of forty-six (46) companies, which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots and reships such goods to members' plants at various locations throughout the United States. Among the members of the Association are several companies, such as The Boeing Company, which are actively engaged in work for the national defense. Needless to say, the injuries which would be inflicted upon any of the member companies pursuant to an unlawful strike or boycott are so severe as to warrant their participation in this proceeding whose end result is likely to be a decisional rule affecting their ability to protect their vital in-

1. That case, filed in the Third Circuit on May 15, 1969 and docketed as Nos. 17,907 and 17,910, is entitled: *Bernard Samoff, Regional Director of the Fourth Region of the National Labor Relations Board, Petitioner-Appellee* v. *International Association of Machinists, District Lodge No. 1, Respondent-Appellee (Terminal Freight Cooperative Association, Charging Party-Appellant and Terminal Freight Handling Co., Charging Party-Appellant).*

2. Unfortunately, the Third Circuit's decision never reached the merits of the issues which that case (*Samoff*) had in common with the instant *Sears* case. Both the Board and the respondent union in *Samoff* moved the court to dismiss the appeal as being moot since the underlying dispute which gave rise to the alleged unlawful conduct involved there had been settled prior to oral argument. The court granted these motions to dismiss on December 18, 1969, over the vigorous opposition of appellants, and despite the fact that the merits of the appeal had been thoroughly briefed and orally argued. Appellants are currently preparing a motion to the Third Circuit for reconsideration or rehearing *en banc* on the question of mootness. This motion will urge, in part, that the very same arguments which were successfully made by the Board in support of their contention of mootness in the Third Circuit were without success when made by the Board to this Court in the present proceeding involving an analogous factual posture.

terests in the event of the occurrence of the described unlawful conduct.

The Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association. It operates thirty-six (36) terminal facilities in twenty-four (24) States and the District of Columbia.

In the *Samoff* case, just as in the instant *Sears* case, charges were filed with the National Labor Relations Board alleging that the charged respondent-union was engaging in an unlawful secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U. S. C. § 158(b)(4)(B). The Regional Director found merit in the charges and, pursuant to his mandatory duty under Section 10(l) of the Act, petitioned the district court for appropriate injunctive relief. However, prior to the district court's hearing on the injunction petition, the Regional Director and the respondent-union agreed to a Stipulation providing that the union would cease its alleged unlawful conduct. The Regional Director then moved the district court to approve this Stipulation in lieu of conducting a hearing on its petition and granting injunctive relief. The Company and the Association, charging parties before the Board, opposed the approval of the Stipulation whose effect would be to deprive them of the protection of a court-ordered injunction and the potential sanction of contempt connected therewith. The district court judge declined to hear and consider the charging parties' objections, however. He predicated his refusal on the ground that they did not possess the status of "parties" in the district court proceeding; that is, they were not "parties" and had not moved to "intervene", although their counsel had filed an appearance in the case. Therefore they were asserted to lack standing to be heard.

The judge incorporated this ruling in his Order approving the Stipulation:

> "The Stipulation of Petitioner [the Regional Director] and Respondent as modified and initialed by them is hereby approved over objection of Terminal Freight Cooperative Association and Terminal Freight Handling Co., Charging Parties, who, having entered their appearances by counsel but who have not moved to intervene, do not constitute parties and lack standing to be heard on their objections."

Thus the charging parties were not permitted to protest what they viewed as the Regional Director's compromise of his original position in which he sought a hearing on his Petition and an Order of Court granting injunctive relief, which compromise had resulted in damage to their essential interests and deprived them of the specific relief to which Section 10(l) entitled them.

The Company and the Association, the charging parties, appealed the judge's Order to the Third Circuit on the ground that they were denied their rights as "parties" to the proceedings in the District Court, the existence of which status obviated any need to seek to intervene in that court, and were thereby deprived of rights guaranteed them in Section 10(l) of the Act.

The Board moved to dismiss the appeal in the Third Circuit on two grounds which are relevant here[3]. First, charging parties lack standing to appeal *either* the alleged denial of rights conferred upon them in the district court by Section 10(l) or the result reached by the district court judge; this lack of standing was said to be a consequence of the statute's failure expressly to accord them such appellate rights. Second, the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1932), bars any efforts by private parties to

3. The Board's third ground, of course, was the alleged mootness of the appeal.

secure injunctive relief, whether by an initial application to the court or by an effort to correct an erroneous refusal to grant such relief pursuant to a petition filed by the Board by means of appellate review.

It is clear, therefore, that the legal issues posed in the Third Circuit are identical to those involved in the instant appeal by Sears and that a decision on the merits in the latter case will control the disposition of the former, assuming the contention of mootness in *Samoff* may be overcome.

Moreover, the need for determining the nature and limits of charging parties' appellate rights under Section 10(l) can best be understood by appreciating the various contexts in which the issue arises and in which the impact of a resolution will be felt. It is, further, in the interest of all parties whose rights will be directly affected by the result in this case that this Court be apprised of the varying situations which its decision will control and for whose resolution it should therefore be tailored.

ARGUMENT.

I. The Range of Charging Parties' Interests Involved in Proceedings Under Section 10(l) Requiring Recognition, Clarification and Protection.

The ramifications of a determination of charging parties' judicial rights under Section 10(l) of the Act are important, manifold and undecided by this Court.

In *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283* v. *Scofield et al.; United Automobile, Aerospace and Agricultural Implement Workers et al.* v. *Fafnir Bearing Company et al.*, 382 U. S. 205, this Court delared the *right*, after a final Board order, of successful charging parties

to intervene and participate as full "parties" in the appellate consideration of their cases notwithstanding the Board's participation on their behalf. Section 10(f) of the Act confers an equivalent right upon unsuccessful charging parties.

The question posed under Section 10(l) is whether any such rights exist on behalf of charging parties when the judicial consideration of their charges occurs prior to a final Board order. It is submitted that the rationale of *Scofield* and *Fafnir* compels the extension of this Court's recognition of charging parties' vested rights in the judicial litigation of their charges to all stages of that process.

Although the Tenth Circuit sought to distinguish *Scofield* and *Fafnir* on the grounds that they dealt with the securing of permanent injunctive relief via the review or enforcement of final Board orders under Sections 10(e) and (f), rather than the securing of temporary injunctive relief under Section 10(l), the attempted distinction is without merit. First, *Scofield* argued in terms of general truths concerning this right to be heard fully and effectively. The exercise of this right should not depend upon whether the hearing is on a request for needed permanent or needed temporary relief. Second, Sction 10(h) of the National Labor Relations Act exempts from the operation of the Norris-LaGuardia Act *all* federal court proceedings authorized under Section 10—including 10(e), (f), (j) and (l)—so that no distinction between suits for permanent relief (10(e) and (f)) and temporary relief (10(l)) can be predicated upon Norris-LaGuardia. Third, the basis for permitting charging parties to participate in proceedings under 10(e) and (f) apply equally to 10(l), *i.e.* to prevent harm to the charging party through an adverse decision to which the charging party was not a full and effective participant at *all* levels of the judicial process. The damage which an

unlawfully boycotted employer may suffer who is unable to secure temporary injunctive relief from an illegal strike is no less than the damage he may suffer as a consequence of a final order of the Board. Surely, mere speculation as to the difference, if any, in the quantum of damage suffered cannot serve as the basis for denying the right to the fullest possible participation by the charging party to further and protect his jeopardized vital interests.

It follows, therefore, that the logic of *Scofield* applies as well to cases under Section 10(l) especially where, as here, the Board declines to represent the charging parties' interests.

The problem of fixing charging parties' rights under Section 10(l) has arisen in a variety of contexts. The *Sears* case in the Tenth Circuit involved the right of charging parties under Section 10(l) to appeal an adverse order of the District Court when the Board refused to appeal. The pending *Samoff* case in the Third Circuit deals with the rights of charging parties to appeal the district court's erroneous refusal to permit them to exercise there the participatory role expressly granted them in Section 10(l), as well as to appeal the district court's refusal to grant injunctive relief. The question in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), concerned the extent to which charging parties could perform an independent role in the district court in support of the Board's petition for an injunction after the Board changed its mind about pursuing the relief sought in its own petition. *Houston Insulation Contractors Association* v. *NLRB*, 339 F. 2d 868 (CA 5, 1964), involved a charging party's attempt to secure a stay of a Board order in the Court of Appeals, the effect of which would be to continue in force an injunction granted under Section 10(l) which would otherwise have expired. And

in *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, ... F. 2d ....., 69 LRRM 2535 (CA 9, 1968), a successful charging party sought to intervene in the Appellate Court in an action brought by a union to review the district court's grant of injunctive relief under Section 10(l).

Although each of these cases involved a somewhat different question from the others, yet they are alike in that the result in each hinged on an interpretation of the rights accruing to charging parties under Section 10(l) of the Act.

The variety of situations in which charging parties' rights depend upon an analysis of the meaning of that Section and the diversity among the Court of Appeals' decisions which have undertaken such an analysis requires clarification. Thus the Tenth Circuit in the *Sears* case prohibited charging parties from appealing a denial of the Board's petition for injunctive relief principally in reliance upon the alleged requirements of Norris-LaGuardia,[4] while the Ninth Circuit in *Retail Clerks* held Norris-LaGuardia to be irrelevant to charging parties' efforts to support the Board's petition in the courts. Although the Fifth Circuit in the *Houston* case expressly reserved decision on the applicability of Norris-LaGuardia to charging parties' efforts to obtain injunctive relief via a stay, both the court's language and its action in granting the stay strongly suggest that it would not find Norris-LaGuardia to constitute a bar in cases where the Board had itself filed a petition for such relief at an earlier stage in the case. And whereas this Court in *Scofield* accorded successful charging parties equal status in the appellate courts with those who had not been successful, the later Ninth Circuit

4. The *Sears* case appears to constitute the first instance in which a charging party before the Board has argued that it enjoyed the status of a "party" in 10(l) cases without the need, therefore, for seeking to intervene in order to protect its rights.

decision in *San Francisco-Oakland* refused to do so by denying charging parties the right to intervene at the appellate stage of Section 10(l) litigation.

Accordingly, in recognition of the range of problems which have arisen, and which will continue to arise in the absence of this Court's illumination of charging parties' judicial and appellate rights under Section 10(l), together with the need to harmonize the conflicting decisions of the Courts of Appeals which have explored the breadth of those rights, the decisional rule which this Court will announce in this case should embrace and dispose of each of the enumerated issues presented in the foregoing cases.

With respect to the contents of that rule, the *amici* respectfully suggest that charging parties should be deemed party litigants in proceedings under Section 10(l) just as they are in all other proceedings, both before the agency itself and in the courts, which are authorized by the Act. There is no sound reason for conferring a lesser status on charging parties in litigation pursuant to 10(l) than in such other litigation and proceedings; their interest in the outcome is as great, if not greater due to the business consequences of an unlawful boycott or unlawful picketing; their rights which are involved, both public and private, are as real and are equally entitled to protection; and the due process requirement that one who is conferred a right should have a forum in which to enforce and protect it applies as well to the existence of appellate rights under Section 10(l) as it does elsewhere in the Act where such appellate rights are conferred.

II. The Tenth Circuit's Decision Represents a Retrogressive Step in the Judicial Evolution of Charging Parties' Rights.

There has been recently an expanding awareness in the courts of the legitimate rights and interests of charging parties under the Act. The decision of the Tenth Circuit constitutes an anomalous retreat from the movement of those courts.

The Ninth Circuit's decision in *Retail Clerks* represented an effort to move the discussion of charging parties' rights from the level of cliché to that of an awareness of their legitimate right to participate in proceedings governing their essential interests.

Scofield represented further movement in that direction as this Court recognized for the first time the right of successful charging parties to continue to represent their interests in appellate proceedings. In the course of doing so, this Court acknowledged the irrelevance of doctrines which had limited charging parties' participation since the early days of the National Labor Relations Act, such as the concept that the statute recognized and enforced only "public" rights.

Other courts have participated in this movement. For example, in *Leeds and Northrup* v. *N. L. R. B.*, 357 F. 2d 627 (CA 3, 1966), the Third Circuit overturned a long-standing Board practice by declaring that charging parties were entitled to an evidentiary hearing on their objections to unilateral settlement agreements which the Board in its alleged unreviewable discretion had regularly taken over the charging parties' futile objections. Henceforward charging parties are entitled to a record upon which they may seek appellate review.

Even the Board has recognized this development as, for

example, in *Spector Freight*, 141 NLRB 1110 (1963), in which it acceded to a greater role by the charging party in examining witnesses in Board hearings.

In the light of this evidence of the current of the law, the Tenth Circuit's refusal to recognize charging parties' status as party litigants before it, and to permit them to be heard on matters affecting their vital interests, both represents a return to limiting and formalistic doctrines which have been increasingly discarded by our courts and ignores the requirements of due process and of the settled decisional authority which has recognized and participated in that development of the law.

CONCLUSION.

For the foregoing reasons the *amici* urge this Court to reverse the decison of the court below denying petitioner's standing to seek appellate review from an adverse district court decision denying them appropriate injunctive relief under Section 10(l).

Respectfully submitted,

JERRY KRONENBERG,
BOROVSKY, EHRLICH & KRONENBERG,
111 West Washington Street,
Chicago, Illinois 60602,
JOHN W. PELINO,
PELINO, WASSERSTROM & CHUCAS,
Architects Building,
17th and Sansom Streets,
Philadelphia, Pennsylvania 19103,
CHARLES C. KIEFFER,
KIEFFER & MORONEY,
1875 Connecticut Avenue, N. W.,
Washington, D. C. 20009,
Attorneys for Terminal Freight Handling Company and Terminal Freight Cooperative Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

AND

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR PETITIONER.

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006,

KALVIN M. GROVE,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

DONALD L. GIACOMINI,
ROTHGERBER, APPEL & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Tenth Circuit Court of Appeals dismissing petitioner's appeal (App. p. 124), is reported at 410 F. 2d 1148, 71 LRRM 2251. An official transcript of the unreported decision of the District Court refusing to grant injunctive relief under Section 10(l) on the basis that no violation of law had occurred, from which decision petitioner sought to appeal, is found at App., p. 22; the subsequent decisions of the National Labor Relations Board and its Trial Examiner, reported at 176 NLRB No. 120, finding that the charged violations of law had in fact occurred are found at App., pp. 130 and 180 respectively.

JURISDICTION.

The opinion and judgment of the Court of Appeals dismissing petitioner's appeal were filed and entered on May 15, 1969.

An order was entered by Mr. Justice Black on August 13, 1969, extending the time for filing a petition for writ of certiorari.

The petition for writ of certiorari was filed on August 15, 1969 and was granted on November 17, 1969.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioner's appeal is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.* are set forth in the Appendix at pp. 142-147.

QUESTION PRESENTED.

Where a charging party before the National Labor Relations Board has filed charges alleging it was aggrieved by a union's unlawful picketing, which charges, if they have reasonable basis in fact and law, require the Board's Regional Director to seek injunctive relief, and where the Regional Director does find reasonable cause to believe a violation of law was committed and seeks such injunctive relief, may the aggrieved charging party appeal the District Court's refusal to grant such injunctive relief when the Board's Regional Director is unwilling to do so?

A resolution of this question depends, in turn, upon a resolution of the following issues, among others, which it encompasses:

(1) Does the denial to charging parties of the right to judicial review of cases in which they are conferred express rights in lower courts infringe due process of law?

(2) Does an appeal constitute a new cause or only a continuation of the same cause litigated below?

(3) Does the Norris-LaGuardia Act bar aggrieved charging parties from an appeal in an injunction suit of which a court has already, and properly, taken jurisdiction?

(4) Does Congress' silence on the question of charging parties' appellate rights under Section 10(l) require the conclusion that Congress intended to deny them the right to appeal adverse district court decisions when the Board refuses to appeal?

(5) Are the private rights which the Act recognizes enforceable only in situations in which final Board orders issue, or do they exist as well in proceedings under Section 10(l) for interlocutory relief?

(6) Does the scheme of the National Labor Relations Act demonstrate Congress' purpose to accord charging parties the status of party-litigants in proceedings under Section 10(l), with an attendant right independently to seek appellate review of adverse district court decisions?

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioner herein, alleging that Respondent union had engaged in enumerated unfair labor practices within the meaning of Sec. 8(b)(4)(i)(ii)B of the Act, 29 U. S. C. § 158(b)(4)(i)(ii)B, which proscribes secondary boycotts by unions. After conducting a preliminary investigation of the charges, as required by Sec. 10(l), Respondent Clyde F. Waers, Regional Director of the Board,* concluded

* Mr. Waers was succeeded, upon his recent death, by Francis Sperandeo, as reflected in the revised case caption.

that there was reasonable cause to believe that Respondent union was engaging in unfair labor practices, as charged by petitioner and that an unfair labor practice complaint should issue. Thereupon, pursuant to Sec. 10(l), Waers filed a petition in the District Court seeking a temporary injunction against the union's unlawful picketing of petitioner's premises (App., p. 3). A hearing on an order to show cause was held during which the petitioner and Respondents participated, as provided in Sec. 10(l). (App., p. 13). After presentation of evidence the District Court dismissed the petition for temporary injunctive relief on the grounds that the evidence failed to establish a violation of law and that there was "little probability" that the Board would grant the requested relief when the matter was heard on the merits in formal agency proceedings. (App., p. 22, p. 28).

Although Respondent Waers persisted in his belief that the union had committed the charged unfair labor practices, as evidenced by the fact that, on behalf of the Board, he continued in the prosecution at the agency level of the complaint issued against the union (App., p. 15), he refused to appeal the district court's denial of injunctive relief. Throughout this period the union continued to picket petitioner's premises. Faced with the union's continuing picketing, with the Board's refusal to appeal, and with the prospect of many months of litigation before the Board, petitioner itself sought to appeal the district court's adverse decision in order to secure the relief from an unlawful boycott which Section 10(l) was designed to afford. (App., pp. 30-31).

On February 6, 1969, subsequent to the filing of the appeal but prior to oral argument, a Trial Examiner of the Board issued a Decision on the merits of petitioner's charges, following a formal evidentiary hearing, in which

he found that the Respondent union had in fact committed the unfair labor practices charged. (App., p. 80).

In its decision of May 15, 1969, the Court of Appeals dismissed petitioner's appeal, holding that petitioners lacked standing to appeal for two reasons; first, since Section 10(l) did not expressly grant that right, therefore Congress did not intend its existence; and second, the Norris-LaGuardia Act, 29 U. S. C. A. § 107, which limits courts' jurisdiction to grant injunctive relief, bars such an appeal by any party except the Board. (App., p. 124). The Court of Appeals did not reach the merits of the District Court's decision, the case having been argued principally on Respondents' motions to dismiss the appeal for lack of standing. (App., pp. 36-80).

On June 20, 1969, the Board rendered its Decision and Order on the merits of the underlying dispute, in which it affirmed the Trial Examiner's finding that Respondent union had engaged in the illegal conduct charged by petitioner and alleged by the Regional Director in his suit for injunctive relief. (App., p. 130).

It was only after the issuance of the Board's Decision that the union ceased, at least temporarily, its unlawful picketing. The union's petition for review of the Board's Decision is currently pending in the Court of Appeals for the District of Columbia Circuit. (App., p. 135). The Board has filed a cross-petition for enforcement of its order. (App., p. 139). Sears, petitioner herein, filed a motion to intervene in the enforcement and review proceedings (App., p. 137), which motion was granted by the court (App., p. 141). Oral argument in the District of Columbia Circuit is scheduled for January 22, 1970.

SUMMARY OF ARGUMENT.

This case presents an important question involving the appellate rights of charging parties before the Board in proceedings under Section 10(l) of the National Labor Relations Act. To charging parties the existence of this right may be synonymous with economic survival in the face of an adverse decision in the district court which the Board, as here, refuses to appeal for unstated reasons unrelated to the merits of the dispute. To the orderly development of law the issue is significant as it involves a clarification of the requirements of due process of law and of the intent of Congress in enacting Section 10(l), it requires a resolution of a conflict in the circuits, it permits this Court to offer needed guidance to divided courts in the correct application of the Norris-LaGuardia Act to injunction proceedings under Section 10(l), and it enables this Court to void a decision of the Tenth Circuit which is in conflict with this Court's decision in *United Automobile Workers* v. *Scofield* (*Fafnir Bearing Co.*), 382 U. S. 205.

Petitioner Sears contends that their interest in proceedings under Section 10(l) of the Act are such that under ordinary principles of law and equity and pursuant to the scheme of the Act and the requirements of due process, they woud constitute "parties" to those proceedings: the violation of *their* rights gave rise to charges which *they* filed; *they* sustained substantial and irreparable harm as a consequence of that violation; the Board sought to prevent a recurrence of injury to *their* rights and interests by filing a petition for an injunction; and the preservation of *their* legitimate and essential rights and interests is at stake in the outcome of the litigation instituted by the Board at *their* behest and for *their* benefit. Since no provision of the National Labor Relations Act or any other statute prohibits according them the status of "parties"

in the district court proceedings which result from the charges they filed with the Board or otherwise prohibits their exercise of the right of appellate review, and since, affirmatively, the provisions of the Act and decided judicial authority do accord them rights of participation which are exercised only by "parties", therefore their is no reasonable basis to deny them that status.

(1) Section 10(l) is silent as to the right of a charging party to seek appellate review from an adverse district court decision when the Board's representatives decline to do so. However, this Congressional silence is not controlling on the existence of such a right. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 11, *United Automobile Workers* v. *Scofield (Fafnir), supra.* This is particularly clear with respect to Section 10(l) since courts have regularly recognized a series of rights flowing from that Section which are not expressly granted therein. These include both unstated rights of the charging party to participate in the process of litigation itself as well as rights to seek review of adverse decisions by the Board and by respondents. Under these circumstances the failure of Congress expressly to grant charging parties the right to seek review can have no greater significance than Congress' failure expressly to grant the same right to the other parties to the litigation.

(2) The scheme of the Act constitutes further evidence that Congress intended to accord to charging parties the status of "parties" in proceedings arising under Section 10(l) with the attendant right to seek appellate review. Thus Congress created a specific extraordinary remedy on their behalf in Section 10(l) and throughout the statute made the interests of the charging parties central to all proceeding authorized by the Act. Indeed, charging parties are expressly made "parties" to all such proceedings and

are accorded the right to seek review from all adverse agency decisions. This fact, plus the grant of so specific and extensive rights in Section 10(l) demonstrate Congress' intention that charging parties should both possess and exercise the same rights flowing from the same status as a "party" pursuant Section 10(l) as they possess and exercise with respect to every other proceeding under the Act; the grant of rights exercised only by parties suggests an intention to create the status of "parties". That Congress did so intend is further supported by an analysis of the language of the statute itself, by the fact that the posture of charging parties in cases under Section 10(l) was made analogous to their status elsewhere under the statute where they do function as "parties", and from a review of the legislature history of that Section.

(3) Reliance by the court below on the purported operation of the Norris-LaGuardia Act in order to deny charging parties the right to review in cases under Section 10(l) is misspelled. Norris-LaGuardia constitutes a limitation on private parties' rights to initiate actions for injunctive relief, and not on their efforts to support such suits once they have been properly brought by the Board. *Retail Clerks Union, Local 137* v. *Food Employers Council,* 351 F. 2d 525 (CA 9, 1965). Efforts by charging parties to secure the success of the Board's petition for injunctive relief by appealing the dismissal of that petition are acts in support of the Board; they merely test the correctness of the district court's dismissal and do not constitute the initiation of a suit for an injunction such as only the Board may institute. The court below failed to appreciate or apply the distinction between "initiate" and "support" and failed to evaluate fully the logic or effect either of *Retail Clerks* or of Section 10(h) of the Act which expressly exempts *all* proceedings arising under the various pro-

visions of Section 10 from the operation of Norris-LaGuardia.

(4) The denial to charging parties of the right to seek review of a decision adverse to their interests violates the requirements of due process of law. Due process requires that when rights are conferred then means for the enforcement of those rights should be assumed, if possible. The decision of the court below recognized the rights which Section 10(l) granted to charging parties yet foreclosed their ability to act to enforce them upon the issuance of the district court's decision; thereafter, the continued protection of those rights was made to depend on the whim of the Board to seek appellate review, an election over which the charging parties can exercise no control. Moreover, the view of the court below that the seeking of appellate review constitutes a new and separate action from the cause being reviewed is legally incorrect and Constitutionally proscribed. *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137. Finally, the right to seek appellate review inheres in charging parties under Section 10(l) whether or not they are deemed to constitute "parties" in the district court. The nafure and extent of their participation, as guaranteed by that Section confers upon them at least the status of "statutory intervenors" or "quasi-intervenors" who have the same right of appellate review as do parties. 4 Moore, Federal Practice 104 (2d ed. 1963). Even should this Court conclude that an express motion to intervene is required of charging parties as a prerequisite to seeking review, such a motion was made to and denied by the court below. Under these circumstances that court's dismissal of the petitioner's appeal below on the ground they lacked standing to lodge such an appeal infringed due process.

ARGUMENT.

In section 10(l) of the National Labor Relations Act, under which statutory provisions this case arises, Congress neither authorized nor prohibited appellate review by charging parties of adverse district court decisions. The question presented here for review arises as a consequence of that silence. The decision of the court below dismissing Sear's appeal was expressly premised both on the statute's failure specifically to accord Sears the independent right to seek appellate review as well as on the purported operation of the Norris-LaGuardia Act, 29 U. S. C. A. § 107; absent Congress' silence of course, there would have been no need to evalnate the effect, if any, of Norris-LaGuardia on charging parties' appellate rights in injunction proceedings under Section 10(l).

In general, Section 10(1) constitutes a mandatory direction on the Board's agents to file a petition for injunctive relief in aid of aggrieved charging parties whenever it appears that there is reasonable cause to believe that the latter's charges are true that they have been victimized by certain illegal strikes, picketing or boycotts prohibited by Sections 8(b) (4) and 8(b) (7) of the National Labor Relations Act. Section 10(l) goes on to provide, in relevant part:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party,* shall be given an opportunity to appear by counsel and present relevant testimony . . ." (Emphasis added).

The Section states nothing further with respect to any participants' additional or other rights in the district court

proceedings and it states nothing whatever regarding the right to appellate review of that court's decision by any of those participants,—be they the charging party, the respondent, or the Board's agents themselves.

Sears submits that Congress' silence is not controlling on the existence of such appellate rights; that these rights arise both from the scheme of the National Labor Relations Act, as well as from the requirements of due process; that the Norris-LaGuardia Act does not apply to efforts to review the correctness of decisions rendered in suits already properly lodged in the Federal courts; and that, in general, charging parties enjoy the status of "parties" in proceedings under Section 10(l), possessing all the rights and privileges—such as the right to seek appellate review—attendant to that status.

A. CONGRESSIONAL SILENCE IS NOT CONTROLLING ON THE EXISTENCE OF CHARGING PARTIES' APPELLATE RIGHTS UNDER SECTION 10(l).

The court below was in error in drawing the inference that the failure of Congress to make specific provisions for charging parties' appellate rights in Section 10(l) evidenced a Congressional purpose to deny them the exercise of such rights.

In *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 11, this Court recognized that the silence of Congress as to the conventional power of an appellate court to stay the enforcement of an administrative order pending the appeal therefrom did not destroy or dilute that power. The controlling assumption, said the Court, is that "Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review." And the Court emphasized (p. 11):

> "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress has said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

The lesson of *Scripps-Howard* case has been applied regularly by courts, including this Court, which have found the existence of both substantive and procedural rights in the face of Congress' failure specifically to articulate their existence. For example, in *Tatum* v. *Cardillo,* 11 F. R. D. 585 (S. D. N. Y.), the Court permitted an employer and its insurer to intervene as parties defendant in a suit for review of an order by a deputy commissioner in the Bureau of Employees' Compensation. It made no difference that the statute provided that the action should be brought against the deputy commissioner. "The statute does not provide that the deputy commissioner shall be the *only party* defendant." 11 F. R. D. at 586.

So, too, in *Roberts et al.* v. *National Labor Relations Board,* 350 F. 2d 427 (CA, DC, 1965), Judge Fahy pointed out that the National Labor Relations Act did not contain a provision (similar to the prohibition against employers) making it an unfair labor practice for a union to discriminate against an employee because he has filed charges under the Act. But Judge Fahy added that "We think none was required", reasoning that in light of the necessity to keep open the channels created by Congress for the administration of a public law and policy, "the legislators may have decided it was unnecessary to make specific prohibitions against union interference with the initiation of charges. See also *Vaca* v. *Sipes,* 385 U. S. 895.

Similarly, in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, the issue concerned the right of a union to be made a party in a Labor Board proceeding. The Board urged that "the National Labor Relations Act does not contain any provisions requiring these unions to be made parties; that Section 10(b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged." This Court rejected that contention because: "In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed." 305 U. S. at 233.

A particularly cogent illustration of the proper approach to claims of rights in the face of legislative silence is found in *United Automobile Workers* v. *Scofield (Fafnir Bearing Co.)*, 382 U. S. 205, in which this Court recognized charging parties' right to intervene in the appellate consideration of their cases notwithstanding a total statutory silence on the subject of their right to do so.

Finally, the error of the court below in restricting the exercise of rights in proceedings under Section 10(l) to those expressly enumerated therein is demonstrable from the exercise of logic as well as from unchallenged past practice. Nowhere, either in Section 10(l) or anywhere else in the Act, did Congress authorize appellate review by respondents against whom an injunction had been issued by a district court. While it is true that the exercise of this right is customary in our judicial system, it is also true that in Section 10(f) of the Act, Congress expressly codified its exercise as to respondents against whom final agency orders had been issued. Pursuant to the theory of the court below, therefore, Congress' failure to provide an analogue to

Section 10(f) in cases involving injunction proceedings should indicate its desire that enjoined respondents lack the right of review. Nonetheless, we are aware of no reviewing court which has precluded such respondents from reviewing the order enjoining their challenged conduct. Similarly, pursuant to the theory of the court below that what is unstated was not intended, charging parties in cases under Section 10(l) lack the *right* to cross-examine witnesses, to respond to motions, or to file briefs, as well as to seek appellate review. In view of Congress' specific grant to them of the right "to appear by counsel and present any relevant testimony", this view produces a series of anomalies: Changing parties are accorded the right to elicit evidence they believe to be legally sufficient from their own witnesses but not from the witnesses of other parties to the proceeding; they are accorded the right to present such evidence without the right to respond to opposing motions to dismiss on the ground that the evidence so elicited is not legally sufficient; they have a right to present such factual evidence without a right to submit memoranda or briefs or oral argument establishing or justifying such a legal sufficiency. Accordingly, the view of the court below that the words of Section 10(l) must be literally and exclusively construed creates a burden too heavy for the laws of logic and common sense to support.

In sum, the existence of rights as to which the statute is silent, and particularly the right to appellate review, becomes a function not of specificity of language but of "the statutory design of the Act" and the requirements of due process. *U. A. W.* v. *Scofield, supra; Consolidated Edison* v. *N. L. R. B., supra.*

B. THE SCHEME OF THE NATIONAL LABOR RELATIONS ACT DEMONSTRATES CONGRESS' PURPOSE TO ACCORD CHARGING PARTIES, IN CASES UNDER SECTION 10(l), THE STATUS OF "PARTIES" IN THE DISTRICT COURT, WITH THE ATTENDANT RIGHT TO INDEPENDENT JUDICIAL REVIEW OF ADVERSE OR PREJUDICIAL DISTRICT COURT DECISIONS.

In enacting Section 10(l) of the Labor Management Relations Act, Congress expressed its concern over the potential harm to neutral employers victimized by unlawful secondary boycotts by requiring the Board to seek injunctive relief whenever it had reasonable cause to believe that an employer's charge of the existence of such unlawful boycotts was meritorious. Congress emphasized its belief in the importance of affording such injunctive relief to aggrieved employers by imposing a mandatory duty on the Board, acting through its Regional Director:

> "If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he *shall*, on behalf of the Board, petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matters." (Emphasis added.)

Having thus expressed its conviction that aggrieved charging parties are entitled to such relief, it is inconsistent with this Congressional purpose to deny charging parties the right to appeal a district court's erroneous denial of that relief in circumstances where the Board declines to appeal. To attribute to Congress a purpose to deprive charging parties of the right to such an appeal would render the Congressional scheme inconsistent and idiosyncratic: Congress' concern for the welfare of unlawfully boycotted employers gave rise to the existence of an extraordinary

remedy in Section 10(l) on their behalf; the duty to seek it was made obligatory on the Board; in order to assure charging parties the fullest opportunity to obtain the relief to which the violation of their substantive rights entitled them Congress expressly conferred upon them independent participatory rights in the district court proceedings which the Board is required to institute on their behalf.

Under these circumstances, and in the absence of any statutory language or legislative history expressly *prohibiting* charging parties' right to appeal, Congress cannot reasonably be understood to have intended to deny them the right to seek review of an erroneous district court refusal to grant appropriate relief in situations where the Board refuses to do so. Such an assumption requires the conclusion that Congress created a substantive right on behalf of charging parties to an injunction of secondary boycotts, yet afforded them no relief from a violation of that right when the Board, for manpower or budgetary reasons unrelated to the merits of the case declines to appeal an erroneous denial of that relief.[1] Such a construction is inconsistent with the statutory scheme to afford appropriate and prompt relief for the described prohibited conduct and is in conflict with the established principle of this Court to avoid such idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

1. It is true, of course, that charging parties' allegations that they had been victimized by an illegal boycott or strike will ultimately be litigated in formal adversary proceedings. In this sense a "remedy" is afforded notwithstanding the denial of injunctive relief. However, this litigation, first before a Trial Examiner, then on review to the Board, extends over many months. When a continuing boycott or strike does irreparable harm to the employer, as the Board's petition for an injunction as well as the statute's provision for injunctive relief admit, then an appealable final order only after so protracted a period constitutes no remedy at all. A victory before the Board, without earlier temporary injunctive relief, would constitute a pyrrhic victory few employers would survive to enjoy.

Moreover, such a view is inconsistent with the general design of the National Labor Relations Act which recognizes and promotes the interests of charging parties and which renders those interests central to all proceedings authorized in the Act. The statutory concern for the protection of those interests would conflict with a denial of the right to appellate review of adverse decisions rendered at any stage of litigation resulting from an initiation of agency action.

(1) Protection of the Rights of Charging Parties is Central to the Scheme of the Act.

Analysis of the statutory scheme, together with the Board's own rules, reveals clearly that Congress intended charging parties to enjoy the full status as parties, with the attendant right to seek review of adverse decisions, throughout the litigation of cases stemming from their charges with the Board:

(a) In Section 10(b) Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(b) Under the Board's construction of the Act, it has accorded the charging party the status of a full party litigant in proceedings before the Board, without limitation as to the various stages of the proceedings involved;[2]

(c) The charging party is accorded the right to appeal adverse decisions of Trial Examiners to the Board, in Section 102.46(a) of the Board's Rules;

(d) The charging party is accorded the further right to seek, after issuance of the Board's order, a

2. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group "... any person filing a charge or petition under the act, ..."

reopening of the hearing, rehearing, or reconsideration; Section 102.48(d) of the Board's Rules;

(e) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the Charging party, *Albrecht* v. *N. L. R. B.*, 181 F. 2d 652 (CA 7, 1950) and cases there cited.

(f) *The Act recognizes and enforces charging parties' private rights.*

Not only does the Act accord to charging parties the status of full "parties" in all proceedings before the Board, and clothe them with all the procedural safeguards customary to that status including the right to seek review at all levels of those proceedings, as was just demonstrated, but the Act also recognizes that the rights which are thus protected include the charging parties' private or parochial rights and interests. One of the principal holdings in *U. A. W.* v. *Scofield*, *supra*, was precisely the proposition that the Act recognizes and enforces the private rights of aggrieved parties, and not merely generalized "public rights". Thus the right to be free of the effects of an unlawful secondary boycott, while it is a right which the Board enforces in the public interest, is also a private enforceable right of the aggrieved victim of that boycott.

In the instant case, Sears was the target of such an unlawful boycott. When the Board declined to appeal the district court's refusal to enjoin that boycott, Sears' sought to protect its private right to be free of such conduct by seeking review of the district court's decision. The propriety of Sears' action is a product of the legislative scheme; the Act repeatedly and uniformly accords to private parties the right to review all decisions adverse to their

interests at all stages of the agency's deliberations without stated exception, while at the same time recognizing the enforceability of their private interests to be free of the effects of unlawful boycotts. The result of the combination of these two propositions is a demonstrable Congressional intention that private parties should also have access to appellate review of district court decisions similarly adverse to their statutorily recognized private interests. Moreover, it is inconsistent with this statutory scheme or legislative purpose to deny the beneficiary of a statutory right the opportunity to act independently to enforce it through appellate review when the Board refuses to do so.

There would be no point to recognizing the distinction between a private and a public right if the private beneficiary were not accorded a role separate and independent from the Board in securing and protecting it. Nor would there exist any real purpose in drawing that distinction if the private beneficiary were not permitted to seek appellate review in order to obtain the relief to which the statute entitles him and which would otherwise be lost to him because of the Board's refusal to act on his behalf. This is a particularly desirable result where, as here, enforcement of the private right serves the public interest by achieving the cessation of Congressionally prohibited conduct which even the Board considered to be unlawful.

The Board has resisted the idea that charging parties should exercise any such independent role in the protection of their own rights. Thus the Board argued to this Court in its brief in *Scofield* and *Fafnir* that "Congress established the Labor Board as the exclusive agency for enforcing the rights created by the Act," and that the role of the charging party was limited to filing charges, participating in the hearing on those charges and appealing from adverse final Board orders. The Board expressly contended

that charging parties have no *independent* role in the appellate consideration of their cases since the Board had the exclusive authority to determine whether to seek review, or to withdraw a case from the court of appeals, or to decline to seek certiorari from an adverse decision.*

In explicitly rejecting the Board's contentions in *Scofield* and *Fafnir*, and by according charging parties appellate rights which permitted them to exercise powers and discretion which could conflict with the Board in areas which the Board had claimed to be within its exclusive province, this Court laid finally to rest any doubts that the scheme of the Act recognized an independent role for charging parties in the protection of their rights.

In sum, analysis of the legislative scheme reveals an intention to accord party status to charging parties under Section 10(l) and to permit them independently to seek appellate review when the Board refuses, for whatever unstated reasons, to do so. Otherwise the Congressional scheme becomes anomolous and idiosyncratic. Accordingly, since Congress conferred party status upon charging parties at every stage of agency proceedings and in the courts following final agency action, it follows that the same status was conferred in Section 10(l) through the use of the same language to perform the same participating role; there is no reason to believe Congress would have deprived charging parties of such a status *only* in the district court in actions under Section 10(l), but nowhere else in the statute at any level of agency or judicial proceedings. Further, the denial of such party status would import into the Congressional scheme an obviously unintended paradox: should the district court find merit in the Board's petition and grant an injunction, the adjudged wrongdoer has an immediate right to appellate review; should the district court

* Memorandum for the National Labor Relations Board, p. 3, Brief for the National Labor Relations Board, p. 27.

erroneously refuse to grant an injunction, the wronged victim has no such right. Despite the fact that the unremedied violations infringe the charging parties' private rights.

Finally, Congress' intent can be determined by analogy to what it provided in the Judicial Review Act, 5 U. S. C. §§ 103-42.

The latter statute, which purported to import the procedures of the National Labor Relations Act into the schemes of other Federal agences, contains the following relevant provisions in § 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto on their own motion and as of right, and be represented by counsel in any proceeding to review such order. . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or *concontinue said proceeding unaffected by the action or non-action of the Attorney General therein.*" (Emphasis added.)

Since the parties in the agency proceedings (which includes the charging party) are given the right to "continue such proceeding" on appeal "unaffected by the action or non-action" of the agency, it would appear that Congress would similarly favor the continuation of proceedings under Section 10(l) by the charging party despite the inaction of the Board which declined to appeal.

(2) Analysis of the Statutory Language Evidences a Congressional Intent to Accord Charging Parties the Status of "Parties" in Litigation Arising Under Section 10(l).

A reading of Section 10(l) reveals that nothing expressly contained therein is inconsistent with the conclusion that charging parties were intended to function as "parties" in proceedings under that Section. On the contrary, the nature and extent of the rights accorded them is consistent with no lesser status.

Manifestly, the enumerated rights of participation granted charging parties exceed those associated with the status of an *amicus curiae*. An *amicus* is not entitled to participate actively in the development or introduction of evidence, or to raise objections, or to make argument during the course of the litigation; he is limited instead, and only with the Court's permission, to oral argument or the filing of briefs *after* the record is made. However the express and necessarily implied provisions of Section 10(l) permit charging parties without need of the court's permission to be represented by counsel throughout the proceedings, to call and cross-examine witnesses, to offer contentious evidence, to introduce documentary and other relevant matter, to make and respond to oral argument and to file briefs.[3] In exercising these rights the charging parties not only create the record which will govern their destinies in the district court, but they also narrow the issues and shape that record for appellate review.

3. The logical necessity for concluding that these enumerated rights flow from the express grant in Section 10(l) was demonstrated above in the discussion of the fact that Congress' silence is not controlling in the interpretation of this Section. Illustrative of the further fact that courts have interpreted Section 10(l) with the same breadth is *Retail Clerks Union, Local 137* v. *Food Employers Council*, 351 F. 2d 525 (CA 9, 1965), a decision cited approvingly on that issue by this Court in *U. A. W.* v. *Scofield*, *supra*.

Were the statute intended to relegate charging parties to the status of *amici*, then their role would not have been expanded to permit such full and active participation as a matter of right. Similarly, if charging parties were not intended to possess the right to seek appellate review they would hardly have been accorded the right to exercise such control over the nature and posture of a record to be reviewed (or not) at the whim of others.

In short, if Congress had not intended charging parties to function as "parties", then they would not have granted them rights such as only "parties" can exercise.

Further support for the proposition that Congress conferred party status upon charging parties in cases arising under Section 10(l) results from a comparison between the rights granted them in Sections 10(l) and 10(j) of the Act, and by analogy to the effect of similar language appearing in the Board's own rules.

(a) Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act.

Sections 10(j) and 10(l) are alike in that both authorize the Board, acting through its Regional Directors, to institute petitions for injunction when the Regional Director believes that charged unions have engaged in such injurious unfair labor practices as render extraordinary injunctive relief appropriate. The sections differ only in that pursuant to Section 10(j) injunctive relief *may* be sought for any violation of that statute, whereas Section 10(l) provides that such relief *must* be sought for the violation of the specific and particularly injurious unfair labor practices enumerated therein.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition *and* be permitted to appear by counsel *and* present any relevant testimony, Section 10(j) requires only that they be notified of the filing

of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections manifests Congress' intent to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests. Such a guarantee goes beyond the presence of and the representation by the Board, which was deemed adequate to protect charging parties in cases arising under 10(j) but was deemed inadequate for cases under 10(l). Rather, the nature of the additional guarantee afforded by Congress was affirmatively to confer upon charging parties in 10(l) cases the status of "parties".[4]

Indeed, if Congress believed that the judgment and participation of the Board in injunction proceedings under Section 10(l) would suffice fully to protect the charging parties' interests, and that they should have no *independent* role in the participation and prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights upon charging parties in 10(l) cases which were denied to those in 10(j) cases. The adoption of such a view would render meaningless the deliberate statutory distinction between the rights conferred in the two sections. It follows, therefore that Congress intended to accord charging parties in 10(l) cases

4. The difference between the rights accorded to charging parties in the two sections is justifiable on two grounds. First, the nature of the conduct with which Section 10(l) deals, *i.e.*, unlawful strikes and boycotts, inherently involves the greatest potential harm to the aggrieved victims. For this reason Congress also imposed a mandatory duty on the Board to seek injunctive relief in cases arising under that Section whereas in all other cases, such as are dealt with in Section 10(j), the Board is given discretion as to whether to seek such relief.

Second, it would be inconsistent with the discretion accorded the Board in Section 10(j) to confer independent party status on charging parties in the later cases since they might seek to go forward in instances where the Board's discretion dictated otherwise. Clearly, when the Board is required to proceed, as in Section 10(l), no such potential conflict exists.

the independent status of "parties", clothed with the rights of that status, including, therefore, the right to seek appellate review.

(b) Charging Parties' Status in Proceedings Under Section 10(l) Is Analogous to Their Status in Administrative Proceedings Before the Agency in Which They Are Deemed "Parties" and Are Accorded the Right of Appellate Review.

Although their charges initiate the Board's investigation of their cases, charging parties cannot compel the Board to issue a complaint; that right, under Section 3(d) of the Act, is within the exclusive province of the Board's General Counsel. *Hourihan* v. *NLRB*, 201 F. 2d 187 (CA DC, 1952), cert. den. 345 U. S. 930. Neither can the charging parties control what the complaint shall allege nor seek unilaterally to expand its allegations once it is filed. *Piasecki Aircraft Corp.* v. *NLRB*, 280 F. 2d 575 (CA 3, 1960). Nonetheless, once the complaint has been filed, and despite these limitations, charging parties are expressly made full party-litigants in all proceedings before the Board with a right to review any adverse decision in the courts.

In Section 102.8 of the Board's Rules and Regulations, charging parties are accorded the full status of "parties" in all Board proceedings, without limitation.

Section 102.38 of the Board's Rules and Regulations, entitled "Rights of Parties," provides as follows:

> "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, . . ."

Section 101.10, again defining parties' rights in formal hearings, provides that:

> ". . . all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner."

According to the Board's own Rules, therefore, one who is a full "party" before the Board possesses precisely those rights which Section 10(l) confers upon charging parties in the district courts; conversely, full party litigants in Board proceedings are conferred no rights which are denied to charging parties in district court proceedings.

Analogously, charging parties cannot compel the Board to file a petition for an injunction under Section 10(l), nor can they dictate its terms or vary them after it is filed. Yet Congress, in Section 10(l), conferred on charging parties a participatory role and participatory rights which are identical to those which the Board's Rules and Regulations confer on "parties" in formal Board proceedings.

The virtual identity of the rights granted and the language employed in specifying and granting them which appear both in the Board's Rules and in Section 10(l) argues strongly for the proposition that the same legal status of "party" was created and described in each. There appears to be no logical or rational basis for doubting that the use of essentially the same words by the Board and by Congress to confer the same rights of participation on charging parties did achieve, and was intended to achieve, the same legal status.

Therefore, by analogy, the right to seek judicial review from adverse district court decisions in 10(l) cases must have been intended by Congress just as the right to seek such review from adverse administrative rulings was intended.

The force of this analogy was recognized by the Ninth

Circuit in *Retail Clerk Union Local 137, supra,* where at footnote 4, that Court found merit to the contention that just as the Board cannot absolutely control the administrative consideration of cases once the General Counsel has "embarked upon the judicial process," similarly the Board may not control the courts' consideration of cases under Section 10(l) once the filing of the Board's petition for an injunction has conferred jurisdiction on the courts. In both instances the nature of the rights conferred on charging parties give them an independent role in pursuit of the success either of the Board's complaint or its petition under Section 10(l).

(3) Congressional Intent As Revealed by the Legislative History of Section 10(l).

The debates preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the degree to which charging parties before the Board should be accorded the rights of parties to full participation in, and independent access to, the district courts in cases where unions engage in unlawful secondary and organizational picketing.

An analysis of those debates reveals that in Section 10(l) Congress effected a compromise; while it limited charging parties' rights independently to initiate injunction proceedings in the courts, at the same time it sought to guarantee to charging parties the right of full participation in such proceedings once they were initiated by the Board.

The essential conflict which Congress was required to resolve was between the interest of private parties to the speediest and most direct remedy against the devastating effects of illegal boycotts and strikes, and the opposing policy of the Norris-LaGuardia Act to limit the jurisdic-

tion of the district courts to issue injunctions in labor disputes. The former interest required expeditious access to the courts' injunctive processes, the latter policy offered protection against a system whereby private parties could create a body of law forged by courts from theories urged by private parties independently of or in conflict with these urged and developed by the Board.

By way of resolving these conflicting values the House bill elected to permit private parties to move independently and unilaterally for injunctive relief:

> . . . The House bill [H. R. 3020], in section 12, provided for injunctions at the request of private persons, rather than by the Board, in [cases under Section 10(l)]. *House Conference Report* No. 510, Leg. Hist. 561.

This provision was not adopted since it would have constituted a virtual repeal of Norris-LaGuardia. However, similar proposals were made in the Senate, evidencing the trangible support which existed for direct private injunctive relief.

Throughout the Senatorial debates on the Taft-Hartley amendments, one of the most serious and recurring disputes centered on the so-called Ball amendment. Senator Ball sought to convince his colleagues that private parties should be permitted to seek court injunctions whenever they were individually aggrieved by secondary boycotts and other unlawful picketing, and without prior recourse to the Board. It was argued that this was the best method for avoiding potential harm (Leg. Hist. 561-562, 1057-1058, 1347-70). As contended by a supporter of this amendment, Senator Donnell,

> "[An injured party] should be entitled to engage his own attorney, go into a court which he selects, and direct the conduct of his litigation." (Leg. His. 1353.)

In opposition to this view other Senators argued that the Ball amendment would essentially repeal the Norris-LaGuardia Act in that private parties could forum-shop and institute injunction actions at their own discretion. Some of these opponents of the amendment argued further that the Act should afford no injunctive relief at all; all agreed, however, that even should some form of injunctive relief be provided, private parties should be required to proceed first before the Board rather than themselves initiate suits directly in the district courts.

Ultimately the Ball amendment was defeated for the same reasons which prevented the adoption of the similar provision in the House bill; while Congress was sympathetic to the needs of private parties for the protection afforded by injunctive relief, it was unprepared to permit them to initiate such suits independently and at will (Leg. Hist. 1057-8, 1149, 1347-70, 1544).

Section 10(l), as ultimately enacted, predictably represented a compromise. (1) In order to provide a meaningful remedy for employers faced with injurious unlawful picketing, mandatory injunctive relief was afforded. (2) However, in order to avoid a situation where employers could forum-shop and achieve an independent developement of the law through their own selection of a forum and of theories of violation and relief, the right to initiate injunction suits was limited to the Board. (3) In order to guarantee private parties the right to full participation in court proceedings stemming from unlawful strikes and picketing, *after* the Board initiates the action, Section 10(l) was drafted expressly to confer on charging parties rights associated only with full "party" status. (4) And in order to eliminate the possibility that Norris-LaGuardia might be interpreted to impose a limitation either on the Board's right to institute such injunction proceedings or on charg-

ing parties' rights thereafter to fully pursue their interests in those proceedings, Congress enacted Section 10(h) providing:

> "When granting appropriate temporary relief or a restraining order, . . . as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115) [Norris-LaGuardia Act]."

Accordingly, a review of the legislative history of Section 10(l) reveals Congress' purpose to afford private parties needed injunctive relief; to preserve the effect of Norris-LaGuardia only to the extent that the right to initiate injunction actions was limited to the Board, thus depriving private parties of the opportunity of engaging in those abuses which gave rise to Norris-LaGuardia; but otherwise in Section 10(h) to eliminate the operation of Norris-LaGuardia from proceedings arising under Section 10(l).

Thus, the sole limitation placed by Congress upon private parties' rights to participate in the district court injunction proceedings stemming from their filing of charges with the Board consisted only of their inability to institute such suits and, by implication, their inability to alter the theories, facts, or nature of relief sought by the Board.

Consequently, when the Board does initiate an injunction petition and charging parties thereafter seek the success of the Board's petition, whether in the District Court or in appellate courts, charging parties thereby exercise rights which the legislative history of the Act demonstrates that Congress intended them to possess.

(4) The Norris-LaGuardia Act is Irrelevant to the Exercise of Appellate Rights Under Section 10(l).

The Tenth Circuit's dismissal of Sears' appeal in the instant case was predicated, as noted earlier, on the previously discussed failure of Congress to specify charging parties' right to appeal and on the purported operation of Norris-LaGuardia. The latter Act, in § 107, provides that "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . ." with certain exceptions not involved here.

While recognizing that Section 10(l) of the Labor Act constitutes an exception to Norris-LaGuardia insofar as it permits *the Board* to institute suits for injunctive relief, the court below held that an appeal by charging parties of a denial of injunctive relief is barred; such an appeal, held the court, is analogous to the institution of a petition for an injunction, an act which may not be done by private parties. In so holding, the Tenth Circuit rejected petitioner's arguments (1) that an appeal is a continuation of a suit already instituted and not a new cause, as was stated by this Court in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137; (2) that charging parties may *support* the Board's petitions for injunctive relief, so long as they rely solely on the facts, theories, and arguments of the Board, without such support constituting initiation of a cause; (3) that Norris-LaGuardia constitutes a bar only to the institution of petitions for injunctive relief by private parties, not to their support of petitions already filed by the Board; and (4) in any case Section 10(h) of the Labor Act expressly exempts all proceedings under Section 10, including 10(l), therefore, from the operation of Norris-LaGuardia.

The application by the court below of Norris-LaGuardia presupposes that an appeal is a separate action from the

cause appealed from, a demonstrably incorrect assumption. By its express terms, Norris-LaGuardia, when applicable, deprives courts of jurisdiction. It is unquestioned that when the Board filed its petition for an injunction in this case it conferred jurisdiction upon the district court. In *Marbury* v. *Madison*, Chief Justice Marshall stated (at page 175):

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause."

Thus, the charging party's appeal did not constitute a new cause or the initiation of a cause, but merely continued a cause in which jurisdiction had already been conferred by the filing of the Board's petition.

The same conclusion,—*i.e.*, the inapplicability of Norris-LaGuardia to the existence of appellate rights under Section 10(l),—follows from alternative lines of reasoning.

Congress carved out an exception to Norris-LaGuardia in situations where the Board *initiates* petitions for injunctive relief. Therefore, when such petitions have been filed *by the Board*, the limitation upon courts' jurisdiction is lifted. Thereafter, courts have jurisdiction to adjudicate those cases in the same manner as any non-labor injunction suit, and the parties to the proceeding have the same rights as do parties in any other such action. The requirement that the suit be *initiated* by the Board carries with it the obvious implication that the courts shall consider only those theories, allegations, and requests for relief which are incorporated in the Board's petition; if private parties were permitted to urge new or expanded or different arguments or theories, then they would themselves be *initiating* a different injunction action from the Board, in contravention of Norris-LaGuardia. But when private parties merely seek to *support precisely* those positions which are

contained in the Board's petition they are not initiating anything and do not contravene the requirements of the Norris-LaGuardia Act. Thus, the distinction between *initiate* and *support* is critical to the question of charging parties' rights in the judicial consideration of cases under Section 10(l).

This argument was recognized and adopted by the Ninth Circuit in *Retail Clerks Union, Local 137* v. *Food Employers Council, supra.*

In *Retail Clerks,* pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a district court for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the district court and sought its approval by that court in lieu of an injunction. The charging parties objected to the approval of the Stipulation and urged the court to grant injunctive relief pursuant to the Regional Director's pending petition.

The district court granted the injunction as requested by the charging parties and over the objection of the Board's Regional Director. The union and the Regional Director then appealed the court's order (in the face, of course, of Congress' silence in Section 10(l) on their right to do so).

In his appeal the Regional Director contended that since Norris-LaGuardia permitted only the Board to seek injunctive relief, and since the Board declined to do so in that case notwithstanding the pendancy of its petition, therefore the district court's action constituted the granting of an injunction of the behest of a private party in violation of Norris-LaGuardia.

On appeal the Ninth Circuit affirmed the district court's decision and order, dismissing the Regional Director's appellate contention as lacking merit.

With respect to the Regional Director's argument, the court held that Norris-LaGuardia and the policy of the Act require only that the Regional Director must *initiate* suits for injunctive relief pursuant to the *mandatory* duty imposed upon him by Section 10(l) whenever he has reasonable cause to believe that one of the sections enumerated therein has been violated. Once he has done so, the limitations of Norris-LaGuardia and the policy of the Act cease to inhibit the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. Accordingly, the Ninth Circuit held that district courts may grant injunctions at the urging of charging parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

In the instant case, the effort of Sears to appeal the adverse decision of the district court was in aid of—or supported—the Regional Director's "original petition for injunctive relief requested by the Regional Director." Hence Sears' efforts constituted a legitimate exercise of rights in aid of a legally permissible objective.

In sum, the considered opinion of the Ninth Circuit in *Retail Clerks* constitutes precedent for the propositions that charging parties in cases under Section 10(l) have the right

to be heard in the district court to urge the granting of injunctive relief, in support of and pursuant to the Regional Director's pending petition, *whether or not the Regional Director continues to seek such relief.* Similarly, they have standing to object to his refusal to persist in his efforts to secure such relief or to his decision to seek lesser relief.[5] And the combination of these rights should be understood to confer on charging parties the status of full party-litigants in the district court; those are rights which are commonly exercised only by "parties," and there are no greater rights which could meaningfully be exercised within the statutory scheme of the Act.

It further follows that if charging parties have the right to support the Board's petition for an injunction in the district courts despite the Board's objections, then logic compels that they should have a similar right to support that petition in the appellate courts when the Board declines to do so.

Additional support for the conclusions reached by the Ninth Circuit in *Retail Clerks* derives from the language of the National Labor Relations Act which demonstrates that charging parties' independent support of the Board's petition is not barred by Norris-LaGuardia. Section 10(l) provides that:

> "Upon the filing of any such petition the District Court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, *notwithstanding any other provision of law.*" (Emphasis added.)

It is significant to note that the statute does *not* state that courts are limited to the granting of relief urged by the Board. On the contrary, once the Board has conferred ju-

5. Further support for the *right* of charging parties to move independently to secure the protection of their private rights is found in *Leeds and Northrup* v. *NLRB*, 357 F. 2d 627 (CA 3, 1966).

risdiction on the courts by filing its petition then the courts are expressly made free to grant appropriate relief pursuant to that petition *without limitation as to the identity of the party urging such relief*. This point was recognized by the court in *Retail Clerks:*

> "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined *whenever a district court has been shown reasonable cause* to believe in their existence and finds that the threatened harm or disruption can be avoided through an injunction." (Emphasis added.)

Thus the court required only that reasonable cause be shown, *not* that it may be shown only by the Board. When the Board argued to the Ninth Circuit that *only* the Board should be permitted to urge as well as to petition for the granting of injunctive relief, and that for private parties to so urge would violate Norris-LaGuardia just as much as if they had filed the petition in the first instance, the court summarily rejected the argument. According to the court, Congress itself determined that private parties should have that supportive right. The court held that:

> "It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of Congress."

Accordingly, the statute itself, together with the principal judicial authority which has interpreted it, expressly provides that private charging parties have standing independently to urge in *support* of the Board's petition, injunctive relief in cases under Section 10(l). Moreover, the statute adds a legislative exclamation point to the granting of this right and status by providing explicitly that they exist "notwithstanding any other provision of law", such as Norris-LaGuardia. It would constitute a mockery of our judicial system to conclude that Congress and the courts

conferred a specific right and status upon charging parties in the district court while at the same time denying them the right to appeal the district court's erroneous refusal to permit the exercise of the right and status so conferred. It seems clear, therefore, that the Norris-LaGuardia Act neither prohibits private charging parties from urging such injunctive relief nor from appealing the erroneous and prejudicial failure of a court to grant it, all in *support* of the Board's previously filed petition.

Finally, to the extent that any doubt concerning the irrelevance of Norris-LaGuardia to such situations could continue to exist, Congress enacted Section 10(h), which declared specifically that in litigation arising under Section 10 of the Act "the jurisdiction of courts sitting in equity shall not be limited by [Norris-LaGuardia.] It should be noted, once again, that Section 10(h) does *not* condition the inapplicability of Norris-LaGuardia to those situations where only the Board urges the success of its petition; rather, the language is unqualified in this respect. Whenever jurisdiction is conferred upon a district court through the filing of the Board's petition, the language of the exemption from Norris-LaGuardia is *absolute* with respect to the court's authority to grant relief pursuant to that petition at the behest of *any* party. *And the elimination of the prohibitions of Norris-LaGuardia further enable such courts to treat the litigants as if the suit were an ordinary equitable action, in which the nature and extent of the interests of the charging parties herein would render them "parties" to the litigation and give them standing to seek review.*

For all of the reasons stated above it is clear not only that the Norris-LaGuardia Act does not bar the right of private charging parties to urge the success of the Board's petition for injunctive relief under Section 10(l), but it is also clear that an analysis of the statutory language of the National Labor Relations Act and of the principal judicial

authority interpreting it reveals a legislative and judicial purpose to permit such conduct and, necessarily therefore, further to permit an appeal by an aggrieved party whose sole purpose is to support the Board's petition by seeking the reversal of an erroneous order dismissing it. The court below, in dismissing Sears' appeal, misconceived the thrust and relevance and the logic of the *Retail Clerks* decision.

(a) In order to convey the impression that no inconsistency exists between the decision of the Tenth Circuit being reviewed here and the decision of the Ninth Circuit in *Retail Clerks,* the Tenth Circuit characterized the holding in *Retail Clerks* as being limited only to rights existing in injunction proceedings *in the district courts.* But this distinction is unsound since appellate review is an extension of the same cause litigated in the district court, rather than a new and separate action. *Marbury* v. *Madison, supra.* Moreover, the Tenth Circuit's decision itself was predicated upon the court's view that Sears lacked standing to appeal since Section 10(l) did not confer upon charging parties *in the district court* rights adequate to create a status entitling them to seek appellate review. Thus the rationale of the court below is inconsistent with its own attempted distinction of *Retail Clerks.*

(b) The Tenth Circuit's reliance on the Norris-LaGuardia Act to justify denying Sears' standing to appeal the district court's failure to grant a *temporary* injunction fails to explain how aggrieved charging parties may obtain a *permanent* injunction under Section 10(f). If Norris-LaGuardia bars courts from granting injunctive relief—except on direct application *by the Board*—then it would seem that this bar would apply to all such relief, whether temporary or permanent. Yet Section 10(f) of the National Labor Relations Act clearly permits charging parties to obtain permanent injunctive relief although the provisions of that Section contain no exemption from the operation

of Norris-LaGuardia. The Tenth Circuit's error consisted in its failure to give effect to Section 10(h) of the Act which removes the bar of Norris-LaGuardia in *all* proceedings under Section 10, including charging parties' appeal from both adverse final orders of the Board (10(f)) as well as adverse final orders of the district court 10(l)).

(c) Although the Tenth Circuit's decision made a brief reference to the distinction between "support" and "initiate" which formed the basis of the decision in *Retail Clerks,* it did not apply the consequences of that distinction to the facts before it. Moreover, its reference to and reliance upon *McLeod* v. *Business Machine & Office App. Mech. Conf. Board,* 300 F. 2d 237 (CA 2, 1962), suggests its failure to appreciate that distinction. In *McLeod* the charging party sought to introduce grounds for injunctive relief which were different than and in addition to those relied upon by the Regional Director in his petition in the district court. The decision of the Second Circuit was premised on the fact that the charging party there had, in effect, initiated an independent basis for injunctive relief which the Board had neither authorized, adopted nor approved. While the Tenth Circuit gave no evidence of awareness of the significant factual difference between *McLeod* and the instant case, the Ninth Circuit's decision in *Retail Clerks* was based upon such an awareness:

> "[*McLeod* is] distinguishable from the present facts where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, but merely supported the original petition for injunctive relief requested by the Regional Director."

(d) The scholarly and detailed analysis of the nature and extent of charging parties' rights under Section 10(l) which characterizes the decision in *Retail Clerks* led that court, unlike the court below, to consider the question in

terms of the policy of the Act and the requirements of equity. Thus that court noted, at footnote 2, that the same policy considerations which support the right of charging parties to a full and adequate hearing before the Board similarly support their right to such a hearing in the courts. But what if the Board elects not to seek such a hearing, as in the example provided by the instant case where the Board failed to appeal the district court's erroneous refusal to afford injunctive relief? The Ninth Circuit's answer, predicated upon the irrelevance of Norris-La-Guardia and upon its awareness that the Act also recognizes and protects charging parties' private rights, has controlling relevance here:

> "We find no inconsistency in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so." (footnote 2)

Under the circumstances of the instant case, where "the NLRB is either unable or unwilling" to appeal an erroneous denial of injunctive relief and in which the damage to the charging party which caused the injunction petition to be filed continues, there can be no sound and equitable basis for refusing to allow the charging party to appeal. This is true even if the charging party is not deemed to have "party" status in the court, but serves in the place of a party, the Regional Director, who declines to continue to represent and protect the charging parties' interests.

It is true that two recent decisions by dissimilar panels of the Ninth Circuit from that which decided *Retail Clerks* reflect some doubt on the current status of the law in that Circuit. On analysis, however, these decisions reveal defects which only serve to emphasize the superior merits of the reasoning and result of *Retail Clerks* itself. Thus, in

San Francisco-Oakland Newspaper Guild v. *Kennedy* (unreported order of May 20, 1968), the Ninth Circuit rescinded a prior order permitting successful charging parties to intervene in a Section 10(l) proceedings. This decision, apart from its apparent inconsistency with *Retail Clerks,* constituted a violation of the teaching of this Court in *UAW* v. *Scofield (Fafnir), supra.* In the second case, *Henderson* v. *International Union of Operating Engineers, Local 701* (No. 24285, decided December 11, 1969), the court concluded that the successful charging party lacked standing to constitute an "appellee" in the court of appeals and was related to the status of *amicus curiae.*

The holding in the latter case is rather difficult to understand or evaluate. Initially, at footnote 2, the court states:

> "Under [Section 10(l)], *any* person involved in the charge is entitled to appear in the district court by counsel and to present relevant testimony. If the order entered by the district court aggrieves *any* such party, it undoubtedly has the right to appeal. . . . " (Emphasis added).

Since the charging party is one of those persons involved in the charge (*e.g.,* a charge typically will allege the unlawful picketing of the charging party's premises), the charging party therefore "undoubtedly has the right to appeal." While this conclusion is consistent with *Retail Clerks,* and is required by the court's language, the court's conclusion is, without clarifying explanation, apparently to the contrary. Second, the court's relegation of the charging party to the status of *amicus* is inconsistent with *Scofield* and *Fafnir* whose very point was that charging parties are entitled to exercise a greater role than that of an *amicus* in the appellate consideration of their vital interests. Third, while the court made reference to the decision of the instant *Sears* case in the Tenth Circuit and noted the latter court's reliance upon Norris-LaGuardia, the Ninth Cir-

cuit itself neither relied upon nor specifically approved that result, nor did it comment on the conflict between that result and its own contrary conclusion regarding the relevance of Norris-LaGuardia in the *Retail Clerks* case. Finally, the Ninth Circuit did not reverse or even limit its holding in *Retail Clerks*, and did not attempt further to explain the practical or theoretical basis for its holding.

A possible explanation for both of these post-*Retail Clerks* holdings consists in the fact that in both cases the charging parties had been successful in obtaining injunctive relief in the district court, in both cases the agents of the Board continued to advocate and represent the interests of the charging party in the court of appeals (unlike the *Retail Clerks* case), and in both cases the charging parties were permitted to file briefs in the appellate court. Thus the court may have felt that the label to be attached to the charging parties in the appellate court was irrelevant since there was nothing more they could have achieved as "parties."

Such a rationale is completely inappropriate and inadequate in the present case, however, where the charging party was unsuccessful in the district court, where the Board refused to continue to advocate and represent the interests of the charging party in the appellate court, and where there was no pending proceeding in which the charging party could even file a brief. In such cases, absent a right to seek review directly as an aggrieved party, the charging parties would find themselves with interests to protect but no judicial vehicle in which to protect them; they would find themselves with rights but without remedies.[6]

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6. Other than the instant case, the only known instance under Section 10(1) in which a charging party sought appellate review as an *appellant*, is the *Samoff* case in the Third Circuit, in which the charging parties were Terminal Freight Handling Co. and Terminal Freight Cooperative Association, *amici* herein. Unfor-

This is precisely the position in which the decision of the court below places Sears due to its incorrect reliance on Norris-LaGuardia and its erroneous refusal to apply the wisdom and learning of *Scofield-Fafnir* and *Retail Clerks*.[7]

C. THE DEMANDS OF DUE PROCESS OF LAW REQUIRE GRANTING CHARGING PARTIES THE RIGHT TO JUDICIAL REVIEW IN CASES ARISING UNDER SECTION 10(l).

This Court has consistently followed the principle that federal statutes should be construed and applied, whenever possible without doing violence to the words actually used, in such a manner as "will bring them into harmony with the Constitution". The *Japanese Immigrant Case*, 189 U. S. 86, 101; and see *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 107-108; *Greene* v. *McElroy*, 360 U. S. 474, 507-508. In that way serious constitutional problems that might adhere to a contrary construction are avoided. Moreover, as noted in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49: "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate, and where applicable, permeates every valid enactment of that body".

Thus the constitutional requirements of procedural fairness and due process must be deemed to permeate the judicial proceedings envisaged by Section 10(l). There is no language in that section that contradicts those requirements. The "manifest purpose in requiring a hearing", once the appellate jurisdiction has been invoked

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tunately, in its decision of December 18, 1969 the court dismissed the appeal as being moot and did not reach the question of the right of charging parties to seek such review (*Samoff* v. *I.A.M. Local 1*, Nos. 17,907 and 17,910).

7. The view of the Ninth Circuit in *Retail Clerks* that Norris-LaGuardia is inapplicable to all proceedings under Section 10 finds support in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964).

under Section 10(l), "is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182; see also *Carter* v. *Kubler*, 320 U. S. 243, 247, construing a provision of the Bankruptcy Act as necessarily guaranteeing "a fair and full hearing".

An elemental ingredient of procedural due process is the right to be heard at all critical stages where one's interests could be protected. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353; *Lane* v. *Brown*, 372 U. S. 477. It is that right which is involved in Sears' effort to review an erroneous and prejudicial decision in the district court. And it is that right which petitioner believes is incorporated into the provisions of Section 10(l) by virtue of the foregoing principle of statutory construction, a principle grounded upon the presumption that, absent contrary words, Congress intended to make available all rights essential to a due process hearing in the courts of appeals.

Analysis of the decision of the court below reveals its effect of denying charging parties the right to a full and fair hearing on the deprivation of its essential interests,—indeed it denies the *right* to any hearing at all at the appellate level.

Pursuant to the decision of the court below, the protection of charging parties' vested rights under Section 10(l) to be present by counsel, to examine and cross-examine witnesses, to introduce relevant documentary matter, to object to irrelevant or prejudicial matter, to argue orally, and to file briefs, depends solely upon the Board's willingness to seek judicial review. This applies both to a district court's denial to charging parties of rights expressly conferred *upon them* in Section 10(l), as well as to the erroneous denial by the district court of the relief to which *they* are entitled. Moreover, the Board's decision

as to whether or not to appeal adverse and erroneous court decisions often depends, as this Court noted in *Scofield*, on "tactical" or "budgetary" considerations unrelated to the merits. The Tenth Circuit, therefore, would render the enforcement and protection of charging parties' vested and guaranteed rights subject to fortuitous and extraneous considerations wholly beyond their power to control or affect. Such a denial of the *right* of appellate review neither is required by the Act nor is otherwise sanctioned by this Court:

> "The supremacy of law demands that there be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (*St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 84, (concurring opinion of Mr. Justice Brandeis)).

In obedience to this principle this Court has recognized the right of interested parties to seek review in this Court in cases arising under the National Labor Relations Act, and in the absence of specific statutory authority permitting such review, where the Board refuses to do so. *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335; *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492. These decisions evidence this Court's conviction that the due process right to a full hearing includes the right of appellate review.

Moreover, to the extent that due process of law requires that an opportunity to exercise or protect granted rights be afforded at all levels of the cause in which they are conferred, that opportunity has been denied Sears in this case. *Ashbacker* v. *F. C. C.*, *supra*. The court below erred in assuming that the district court proceeding was a separate cause from the court of appeals proceeding seeking to review its decision. Thus the Tenth Circuit conceded the existence of exercisable rights on behalf of charging parties

in the district court, which rights disappeared upon the rendering of the latter court's decision.

The error in such a view was recognized as long ago as this Court's decision in *Marbury* v. *Madison*, *supra*, in which, as previously noted, Chief Justice Marshall stated:

> "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause."

The court below would foreclose all opportunity to "revise" and "correct" whenever the Board, for any undisclosed reason of its own, determines not to seek to do so.

Further, the nature and extent of the rights granted to and exercised by Sears in the district court confers upon Sears, without reference to the foregoing arguments, a right to seek review.

Pursuant to the second proviso of Section 10(l), Sears was entitled to and did receive notice of the filing of the petition for injunction in the district court, and was entitled to and was accorded the right to "appear by counsel and present any relevant testimony."

Having taken advantage of these rights granted by law, Sears is further entitled, as a matter of right, to seek review.

> "Where a statute gives an absolute right to be heard, which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal." 4 MOORE, FEDERAL PRACTICES 104 (2d ed. 1963).

Under analogous Acts of Congress such right of appeal is present. For example, under Section 206 of the Chandler Act, 11 U. S. C. § 606, relating to bankruptcy proceedings, the debtor, the indenture trustees, and any creditor or stockholder of the debtor is granted the right "to be heard on all matters arising in a proceeding under this chapter". Although the persons mentioned are not formal

parties, the quoted language has been construed as making these persons "quasi-intervenors" and thus authorizing appeals by them. *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005 (C. A. 3, 1941); accord, *Gleeson* v. *Carr*, 219 F. 2d 64, 67 (C. A. 9, 1955), cert. den, 350 U. S. 827 (1955); *Rogers* v. *Consolidated Rock Prods. Co.*, 114 F. 2d 108, 110 (C. A. 9, 1940), aff'd on other grounds, 312 U. S. 512 (1940); see *Young* v. *Higbee Co.*, 324 U. S. 204, 210.

Thus, having been accorded by Section 10(l) at the very least the status of a "quasi-intervenor" or a "statutory intervenor" in the district court, Sears possesses "a concomitant right of appeal" such that its denial by the court below infringed Sears' right to due process.

It should be added, in connection with the matter of intervention, that apart from Sears' contended status as a "party" in the district court, Sears also moved the court below in the alternative to grant its motion to intervene in order to prosecute an appeal from the district court's decision.[8] In denying this motion the court below continued the process of disenfranchising charging parties in their efforts to protect their vested rights to injunctive relief under Section 10(l). A corollary effect of that dismissal was to ignore again this Court's teachings in *Scofield* and *Fafnir* that technical rules must be subordinated to the right of charging parties to participate as parties in the judicial disposition of their vital interests. *Wolpe* v. *Poretsky*, 144 F. 2d 505 (C. A. 4, 1944), cert. den. 323 U. S. 777; *Smartt* v. *Coca Cola Bottling Corp.*, 337 F. 2d 950 (C. A. 6, 1964), cert. den, 380 U. S. 934; *McKenna* v. *Pan Am Petroleum Corp.*, 303 F. 2d 778 (C. A. 5, 1962); *N L R B* v. *Acme Industrial Company*, 385 U. S. 432 (where this Court granted intervention rights on motion to a party who had not previously participated in the litigation of the case.)

8. The Motion to Intervene was made and supported in Sears' Response to the Motions of the Union and the Board to dismiss its appeal. [App., p. 69.]

Should this Court determine that charging parties do not have standing to seek review in cases under Section 10(l) absent a motion to intervene, then it is urged in the interest of affording due process to such aggrieved charging parties that, in the absence of an appeal by any other party, charging parties may intervene solely in order to prosecute such an appeal, as Sears unsuccessfully sought to do in the instant case.

CONCLUSION.

In reliance upon the arguments and authorities cited above, it is respectfully urged that the judgment below denying charging parties the independent right to seek appellate review from adverse district court decisions in cases arising under Section 10(l) of the National Labor Relations Act be reversed.

Respectfully submitted,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006,

KALVIN M. GROVE,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

DONALD L. GIACOMINI,
ROTHGERBER, APPEL & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

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APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK & CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 15, 1969
CERTIORARI GRANTED NOVEMBER 17, 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK & CO.,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO.

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

RELEVANT DOCKET ENTRIES.

August 29, 1968—Regional Director's Petition for Injunctive Relief Under Section 10(l) of the National Labor Relations Act, filed. (*No. C-1052*)

September 10, 1968—Hearing on Regional Director's Petition conducted before Judge Doyle.

September 27, 1968—Further hearing before Judge Doyle; dismissal by Judge Doyle of Regional Director's Petition.

October 2, 1968—Judgement of dismissal executed by Judge Doyle.

November 29, 1968—Notice of Appeal filed by Sears, Roebuck and Co., charging party before the National Labor Relations Board.

January 7, 1969—Record in C-1052 transferred to the Tenth Circuit Court of Appeals.

August 6, 1969—Issuance of Mandate of the Court of Appeals dismissing the appeal.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

January 8, 1969—Appeal of Sears, Roebuck and Co. docketed.

January 8, 1969—Appellants' Docketing Statement filed.

January 17, 1969—Motion to Dismiss (or in the alternative to Affirm) filed by Appellee-Union.

February 3, 1969—Motion of Petitioner (Regional Director) to Dismiss Appeal For Lack of Standing, filed.

February 18, 1969—Response of Appellant Sears, Roebuck and Co. To Motions of Appellee And Petitioner To Dismiss Its Appeal, filed.

March 18, 1969—Oral Argument conducted in the Court of Appeals.

May 15, 1969—Opinion and Judgment of the Court of Appeals issued, dismissing the Appeal for lack of standing.

August 15, 1969—Notice received of filing by Sears, Roebuck and Co. of a petition for writ of certiorari.

November 17, 1969—Notice received that the petition for writ of certiorari was granted.

UNITED STATES DISTRICT COURT

For the District of Colorado.

(Filed United States District Court, Denver, Colorado, Aug. 29, 1968. G. Walter Bowman, Clerk.)

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent.

Civil No. C-1052.

PETITION FOR INJUNCTION UNDER SECTION 10(l) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

To: *The Honorable, the Judges of the United States District Court for the District of Colorado:*

COMES NOW Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(l) of the National Labor Relations Act, as amended, 61 Stat. 149; 73 Stat. 544; 29 U. S. C. Sec. 106(l) (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before

the Board on charges alleging, *inter alia*, that Respondent has engaged in, and is engaging in acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(l) of the Act.

3. On or about August 9, 1968, Sears, Roebuck and Co. (herein called Sears), pursuant to the provisions of the Act, filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. Copies of said charge are attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the charge filed on August 9, 1968, alleging the Respondent violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, is true and that a complaint of the Board, based on said charge under Section 8(b)(4)(i) and (ii), subparagraph (B) of the Act should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, the Petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Section 2(5), 8(b), and 10(l) of the Act, and has engaged in and is engaging in acts and

conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Sections 2(2) (6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1125—15th Street, Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of the Respondent.

(c) Sears, a New York corporation, is engaged at Denver, Colorado, as a retail department store. In the course and conduct of its business, Sears distributes and sells annually within the State of Colorado goods and other merchandise, having a gross value in excess of $500,000, of which more than $50,000 is transported directly to the State of Colorado from points outside that State.

(d) At all times material herein, Sears has maintained a retail department store at 2575 East 1st Avenue, Denver, Colorado, and has maintained a warehouse at 1701 West 6th Avenue, Denver, Colorado.

(e) Sears is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(f) Joe and Eddie's Carpet Service (herein called Joe and Eddie's), is a partnership engaged in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Joe and Eddie's regularly provide services to Sears, among others.

(g) Daryl Massey, an individual, d b a Duke's Floor Covering (herein called Duke's), is engaged in the business

of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Duke's regularly provides services to Sears, among others.

(h) Joseph Mozzicato (herein called Mozzicato), an individual, is engaged in the business of installing floor coverings in Lakewood, Colorado. In the course and conduct of his business, Mozzicato regularly provides services to Sears, among others.

(i) Francis H. Harris, an individual, d b a Frank Harris Tile Company (herein called Harris), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Harris regularly provides services to Sears, among others.

(j) John Erpelding, an individual, d b a Sea-Ro Tile (herein called Sea-Ro), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Sea-Ro regularly provides services to Sears, among others.

(k) Gerald Fallert, an individual, d b a G & H Tile (herein called G & H), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, G & H regularly provides services to Sears, among others.

(l) Paul E. Clark, an individual, d b a Clark Carpet Service (herein called Clark), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Clark regularly provides services to Sears, among others.

(m) Elmer Neff, Jr., an individual, d b a E & R Carpets (herein called E & R), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, E & R regularly provides services to Sears, among others.

(n) Since on or about July 15, 1968, Respondent has demanded that Joe and Eddie's recognize and bargain with

it as the representative of the employees of Joe and Eddie's.

(o) At no time material herein has Respondent had any labor dispute with Sears.

(p) In furtherance of its demand referred to above in subparagraph (n), and for reasons unrelated to its relationship with Sears, on August 8, 1968, and since that date, Respondent did authorize, establish and maintain pickets at the premises of Sears at its warehouse at 1701 West 6th Avenue, Denver, Colorado, and on August 7, 1968, until August 9, 1968, Respondent did authorize, establish and maintain pickets at the premises of Sears at its retail store at 2375 East 1st Avenue, Denver, Colorado.

(q) By the acts and conduct set forth in subparagraph (n) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sears and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained, and coerced Sears and other persons engaged in commerce or in industries affecting commerce.

(r) An object of the acts and conduct engaged in by Respondent set forth in subparagraphs (p) and (q) above, was and is to force or require Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of and to cease doing business with Joe and Eddie's, Duke's Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

6. It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (p), (q), and (r) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is

therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sears, or at or in the vicinity of any other person engaged in commerce or in an industry affecting commerce doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conducts, or by permitting any such to remain in existence or effect, engaging in, or inducing, or encouraging any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sears, or any other persons engaged in commerce or in an industry

affecting commerce, where in either case an object thereof is to force or require Sears or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark, and E & R.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 29th day of August, 1968.

s/ CLYDE F. WAERS,
Clyde F. Waers, Regional Director, Twenty-Seventh Region, National Labor Relations Board.
Room 260 New Custom House,
721—19th Street,
Denver, Colorado, 80202.

ARNOLD ORDMAN,
General Counsel.
DOMINICK L. MANOLA,
Associate General Counsel.
JULIUS G. SEROT,
Assistant General Counsel.
FRANCIS SPERANDEO,
Regional Attorney, Region 27.
/s/ RICHARD J. WISE,
Board Attorney.
National Labor Relations Board,
Twenty-Seventh Region,
Room 260 New Custom House,
721—19th Street—Denver, Colorado, 80202,
297-3551.

EXHIBIT 1.

Form NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Instructions: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write In This Space

Case No. 27-CC-278
Date Filed August 9, 1968

1. Labor Organization Or Its Agents Against Which Charge Is Brought

   a. Name
   Carpet and Linoleum Layers Union, Local 419

   b. Union Representative to Contract
   Mr. G. Cooney

   c. Phone No.
   244-4884

   d. Address (Street, city, State and ZIP code)
   1129 15th Street, Denver, Colorado

   e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in

unfair labor practices within the meaning of section 8(b), subsection (4) (i) (ii) (B) of the National
(List Subsections)
Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)
Since on or about August 7, 1968, and continuing to date, the above-named labor organization has induced and encouraged individuals engaged in commerce or in an industry affecting commerce to refuse to transport and or perform services for Sears, Roebuck and Co. and has threatened, restrained and or coerced persons engaged in commerce or in an industry affecting commerce with the object in both cases of forcing Sears, Roebuck and Co. to cease doing business with various independent contractor carpet and linoleum installers and or to force said contractors to recognize the above-named labor organization as the representative of the employees of said contractors.

3. Name of Employer
Sears, Roebuck and Co.

4. Location of Plant Involved (Street, city, State and ZIP code)
2375 E. 1st Ave. and 1701 W. 6th Ave.,
Denver, Colorado

5. Type of Establishment (Factory, mine, wholesaler, etc.)
Retail Store

6. Identify Principal Product or Service
Retail Merchandise

7. No. of Workers Employed
approx. 750

8. Full Name of Party Filing Charge
Lederer, Barnhill & Fox for Sears, Roebuck and Co.

9. Address of Party Filing Charge (Street, city, State and ZIP code)
33 S. Clark St., Chicago, Illinois 60603

10. Telephone No.
312-CE 6-1224

11. Declaration
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Lawrence M. Cohen — *Attorney*
(Signature of representative or person making charge) — (Title or office, if any)

Address 33 S. Clark St., Chicago, Illinois

CE 6-1224 — Aug. 9, 1968
(Telephone number) — (Date)

Willfully False Statements On This Charge Can Be Punished By Fine And Imprisonment (U. S. Code, Title 18, Section 1001)

GPO 911-597

RELEVANT TRANSCRIPT REFERENCES FROM HEARING IN THE DISTRICT COURT OF SEPTEMBER 10, 1968 ON THE REGIONAL DIRECTOR'S "PETITION FOR INJUNCTION UNDER SECTION 10(e) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED":

[21] Mr. Giacomini: I have one short matter of housekeeping to take up with the Court. I would like to file the entry of appearance on behalf of Rothgerber, Appel and Powers, and I'd like at this time, Your Honor, to move the admission orally of—

The Court: Wait a minute, now. Don't they have to intervene?

Mr. Giacomini: We do not seek to intervene. Pursuant to the act, the charging party is entitled to be present in court and represented by counsel to present any testimony.

[22] The Court: Do you have any objection?

Mr. Hornbein: It's my understanding they have a right to appear for the limited purpose of introducing evidence and presenting testimony and for that purpose only, and we have no objection to that.

The Court: Very well.

Mr. Giacomini: Should that come up during the hearing, Your Honor, we would do so through counsel that we have retained to represent us and help us and assist us in this case. I'd like to move the admission orally of Mr. Kalvin M. Grove of the firm of Lederer, Barnhill and Fox, 33 South Clark Street, Chicago, Illinois. Mr. Grove is a graduate of the University of Michigan and De Paul University where he received his B.A. He is a member of the Illinois and Florida Bar Associations and a former member of the NLRB from 1960 to 1965. He is a contributing

author to the ABDB Journal and we can vouch for his character.

The Court: Very well, he will be admitted for the purposes of this case.

[159] Mr. Giacomini: Your Honor, so long as you're allowing the government to file a brief, if Sears decides to, may we file one within the same time?

The Court: Why don't you just join with them and give them any counsel you can. Your interests are the same.

Mr. Giacomini: Yes, sir.

The Court: I mean, there's no particular need for separate briefs. So, anything you want to submit to them beforehand, you go right ahead, or, in conjunction with it.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Twenty-Seventh Region.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO and SEARS, ROEBUCK & CO.	CASE NO. 27-CC-278.

COMPLAINT AND NOTICE OF HEARING.

It having been charged by Sears, Roebuck & Co. (herein called Sears), that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C., Sec. 151, *et seq.*, 73 Stat. 519 (herein called the Act), the General Counsel for the National Labor Relations Board (herein called the General Counsel and the Board, respectively), on behalf of the Board, by the undersigned Regional Director for the Twenty-Seventh Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing, and alleges as follows:

I.

The charge herein was filed by Sears on August 9, 1968, and served on Respondent by registered mail on August 9, 1968.

II.

(a) Sears is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of New York.

(b) At all times material herein, Sears has maintained a store and place of business at 2375 East First Avenue, Denver, Colorado, and has maintained a warehouse at 1701 West Sixth Avenue, Denver, Colorado. These two locations of Sears are the only locations of Sears in the Denver area involved in the proceedings herein.

(c) Annually in the course and conduct of its business operations, Sears sold and distributed at its store at 2375 East First Avenue, Denver, Colorado, and at its warehouse at 1701 West Sixth Avenue, Denver, Colorado, goods and products valued in excess of $500,000.

(d) Annually in the course and conduct of its business operations, Sears purchased, transferred and delivered to its store and place of business at 2375 East First Avenue, Denver, Colorado, and to its warehouse at 1701 West Sixth Avenue, Denver, Colorado, goods and materials valued in excess of $50,000, which goods and materials were transported to said store and warehouse directly from state of the United States other than the State of Colorado.

(e) Sears is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(f) Daryl Massey, an individual, doing business as Duke's Floor Covering (herein called Duke's), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Duke's regularly provides services to Sears, among others.

(g) Joseph Mozzicato, an individual (herein called Mozzicato), is engaged in the business of installing floor coverings in Lakewood, Colorado. In the course and con-

duct of his business, Mozzicato regularly provides services to Sears, among others.

(h) Francis H. Harris, an individual, d/b/a Frank Harris Tile Company (herein called Harris), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Harris regularly provides services to Sears, among others.

(i) John Erpelding, an individual, d/b/a Sea-Ro Tile (herein called Sea-Ro), is engaged in the business of tile installation in Denver, Colorado. In the course and conduct of its business, Sea-Ro regularly provides services to Sears, among others.

(j) Gerald Fallert, an individual, d/b/a G. & H. Tile (herein called G & H), is engaged in the business of installing tile in Denver, Colorado. In the course and conduct of its business, G & H regularly provides services to Sears, among others.

(k) Joe and Eddie's Carpet Service (herein called Joe and Eddie's) is a partnership engaged in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Joe and Eddie's regularly provides services to Sears, among others.

(l) Paul E. Clark, an individual, d/b/a Clark Carpet Service (herein called Clark), is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, Clark regularly provides services to Sears, among others.

(m) Elmer Neff, Jr., an individual, d/b/a E & R Carpets (herein called E & R) is engaged in the business of installing floor coverings in Denver, Colorado. In the course and conduct of its business, E & R regularly provides services to Sears, among others.

III.

Respondent is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

IV.

(a) Since on or about July 15, 1968, Respondent has demanded that Joe and Eddie's recognize and bargain with it as the representative of the employees of Joe and Eddie's.

(b) At no time material herein has Respondent had any labor dispute with Sears.

V.

(a) In furtherance of its demands referred to above in paragraph IV and for reasons unrelated to its relationship with Sears, Respondent, commencing on or about August 2, 1968, until August 8, 1968, did authorize, establish, and maintain pickets at the premises of Sears at its retail store at 2201 East Fifth Avenue, Denver, Colorado.

(b) In furtherance of its demands referred to above in paragraph IV and for reasons unrelated to its relationships with Sears, Respondent, commencing on or about August 8, 1968, and continuing to date, did authorize, establish, and maintain pickets at the premises of Sears at its warehouse at 2701 West Sixth Avenue, Denver, Colorado.

VI.

By the acts and conduct set forth in paragraph V above, Respondent has engaged in and has induced and encouraged, and is engaging in and is inducing and encouraging individuals employed by Sears, and by other persons engaged in commerce or in an industry affecting commerce, to engage in strikes or refusals, in the course of their employment, to use, manufacture, process, transport, or other-

wise handle or work on goods, materials, articles, or other commodities, or to perform services, and have threatened, coerced and restrained, and are threatening, coercing and restraining, Sears and other persons engaged in commerce, or in industries affecting commerce.

VII.

An object of the acts and conduct engaged in by Respondent set forth in paragraphs V and VI was, and is, to force or require Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with Joe and Eddie's, Duke's, Mozzicato, Harris, Sea-Ro, G & H, Clark and E & R.

VIII.

By the acts described in paragraphs V and VI above, and by each of said acts, Respondent did engage in, and is engaging in; and did induce and encourage, and is inducing and encouraging, individuals employed by persons engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of their employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, and to perform services, and did threaten, coerce, restrain, and is threatening, coercing and restraining, persons engaged in commerce or in an industry affecting commerce, where an object thereof is, as described above in paragraph VII, forcing or requiring persons to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, and to cease doing business with other persons, and thereby did engage in, and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

IX.

The acts of Respondent as described in Paragraphs V and VI above, occurring in connection with the operations of Sears, described in paragraph II above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce, and the free flow of commerce.

X.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

Please Take Notice that on the 3rd day of October, 1968, at 10:00 a.m. (MDT), at

Room 260 New Custom House
721-19th Street
Denver, Colorado

a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board, on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as Taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

You Are Further Notified that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as

agent for the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Denver, Colorado, this 29th day of August, 1968.

(SEAL)

/s/ CLYDE F. WAERS,
Clyde F. Waers,
Regional Director, Fourteenth Region, National Labor Relations Board,
Room 200,
New Custom House,
721 19th Street,
Denver, Colorado 80202.

IN THE UNITED STATES DISTRICT COURT.

[Title omitted in printing]

(Filed United States District Court, Denver, Colorado, Oct. 4, 1968. G. Walter Bowman, Clerk.)

REPORTER'S TRANSCRIPT.

BE IT REMEMBERED, that the above-entitled matter came on for hearing before The Honorable William E. Doyle, Judge, presiding, Courtroom D, U. S. Court House, Denver, Colorado, at or about the hour of 3:00 o'clock p.m. Friday, September 27, 1968.

Appearances:

J. Richard Wise, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; and

[2] Francis Speranzeo, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver Colorado; and

W. Bruce Gillis, Esq., Attorney at Law, National Labor Relations Board, 260 New Custom House, Denver, Colorado; on behalf of Petitioner.

Donald L. Graconnini, Esq., Attorney at Law, Security Life Building, Denver, Colorado, appearing on behalf of Sears Roebuck & Co.

Philip Hornbein, Jr., Esq., Attorney at Law, 2007 Security Life Building, Denver, Colorado, appearing on behalf of Respondent.

Whereupon, the following proceedings were had, to wit:

[3] Proceedings.

The Court: I asked you to come in today so that I could give you my views of the case. Because, I think there is some urgency about it from the standpoint of both sides. I just received the last memorandum a couple of days ago; I have been buried in trials and other work. So I thought it would be helpful to both of you if I were to just, the best I can, give you my expression as to how I feel about it.

This is an action in which the plaintiff, Waers, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, on behalf of the National Labor Relations Board, seeks injunctive relief against the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, charging that the respondent has been guilty of an unfair labor practice and that it has been picketing the Sears, Roebuck outlets; Cherry Creek and on West Sixth Avenue.

It is alleged that Joe and Eddie's Carpet Service, a partnership, engaged in the business of carpet installation; that that company that association together with others who are enumerated in the Complaint furnished service to Sears. The allegation is that in essence these installers are in a relationship of independent con- [4] tractors to Sears and, thus, the organization's efforts on the part of the respondent are a violation of Section 8(b)(4) of the National Labor Relations Act.

We heard evidence in the matter, which was a question of fact, basically.

I find and determine that the Court has jurisdiction over the case. I note in passing that at the conclusion of the evidentiary hearing, that I made certain findings, and I might run over them now.

At that time I said, "It appears to me that it's not an

ordinary employee relationship; that Sears does, however, contract the whole job; that is, the carpeting or floor covering, plus the services. And, carries the responsibility of seeing to it that the job is satisfactory, because it is a Sears customer. It does not appear, however, that the employee is subject to regular hours; doesn't appear that he gets any of the fringe benefits that other employees get, such as health and welfare benefits and perhaps a pension; the profit-sharing, and some other things that were described that are available to ordinary commissioned or salaried employees at Sears, Roebuck."

The evidence showed that each of them was eligible, on a one day discount pass, whereby they could buy merchandise for ten percent off.

I went on to say: "On the other hand, it does [5] seem to me that Sears has a vital interest in the price of this from what has been presented here because they want to compete in the community. Perhaps more than that, they wish to be able to keep their prices below those of other concerns. And so, this is evident from the fact and the testimony that they have recently found that their margin of profit was nil because the service was eating it all up. So, they insisted on having a $1.35 rate per yard."

And then I said: "Is that right?" And Mr. Wise answered: "Yes."

The evidence shows, as I recall it, that the overall price had been $1.65, and the installers were paying some of the extra expenses such as moving furniture and taking up old carpeting. And, that Sears then negotiated this lower rate.

I then went on to say: "And these facts are pretty well established and undisputed. On the other hand, these fellows appear to be entrepreneurs in some degree because they can take up their work. As I say, they don't get the other benefits that Sears offers its employees, although

they get a ten percent discount on request and application. Isn't that right? Mr. Wise: Yes, sir."

Then I said, "So under these circumstances, I guess the matters are realy conclusions of law more than they are findings of fact, aren't they?" And, it was men- [6] tioned that the installers are ultimately responsible for guaranteeing their workmanship and certainly this is true. And, Mr. Wise said: "The contract does state the installers are responsible for guaranteeing their workmanship and so on and have to pay for any damages which would not make Sears entirely responsible." And I say, "They have to indemnify Sears. For bad workmanship." For example.

I go on to say: "Sears continues to bear the responsibility so far as the customer is concerned. Mr. Wise: I think this is because of the economic factors."

Then I say, "Also Sears is responsible for collecting. The testimony is undisputed that these contractors have nothing whatsoever to do with collecting from the purchaser. Sears does this through its machinery; its credit plan or system. And, if there is a loss as a result of a bad debt or bankruptcy, why, Sears bears the risk of the loss."

I might also add that the relationship arises as a result of the printed contract between Sears and the installer. It doesn't say that here, but I say it. It's prepared by Sears. It sets forth the various stipulations between it and the installer.

All right. It's a very interesting question as to whether as to the basis for Board action or for a holding of unfair labor practice, but my view is that it's [7] not that there is no probability even that the Board will so find. Section 8(b)(4)(A) or Section 8(b)(4)(B), under the 1959 amendment is designed to protect innocent third parties, as I see it, from economic loss as a result of a labor dispute in which they have no concern. This was mentioned in NLRB against Brotherhood of Carpenters and Joiners,

184 F. 2d, p. 60. There are a couple of District of Columbia cases that I think are pertinent. One is Local Union No. 24 of the Teamsters against NLRB, 266 F. 2d 675 at p. 680. This was in the D. C. Circuit, 1959, wherein the court says: "Arrangements of the type here disclosed must be scrutinized by the Board with great care because of the danger that they may be used by the real parties in interest as a device to achieve insulation from union activity." Citing cases. And, citing Local No. 24, Teamsters against National Labor Relations Board, 105 U. S. Appeals, D. C. 271, 276; 266 F. 2d 675, 680 (1959).

And, it goes on: "Of course, in an area so wide as is the field of Labor Relations, there are many situations in which the answer to a dispute under 8(b)(4)(B) is easily derived by the application of such legalistic formulae as 'independent contractors, co-employers, or allies.' But it is equally clear that there is a zone of dispute in which such formulae are useless, and the answer must be derived by applying the intent of the statute to the facts [8] in the case.

"The inquiry in the present case was limited to whether Todaro was an 'independent contractor'. We think it clear, however, that Todaro's relationship to Terminal was in the 'zone of dispute in which such formulae are useless' and that 'applying the intent of the statute to the facts in the case' required consideration of such facts as, for example, the history of Todaro's relationship to Terminal; the conduct of his cleaning business and its relationship to Terminal's business; the Terminal's influence on, if not control over, Todaro's labor policy. In our view, these facts make one capable the conclusion that Terminal was not a neutral within the meaning of the statute."

So the question should be whether the respondent is neutral. I'm not sure. I'm convinced that a categorical approach to this in terms of common law relationship is

not the proper approach, since this is an effort to charge and convict the respondent of an unfair labor practice which in essence is a secondary boycott. The other side of this is that a person boycotted must be someone who is wholly secondary and lacking interest in the controversy; someone who is an innocent bystander, so to speak. And I do not see—looking at the facts here, it's plain to me that the relationship is not that of employer-employee, but at the same time I think that it is somewhat a legalistic relation- [9] ship; an arrangement. And, that a real effort has been made to see to it that it looks like an independent contractor relationship.

The Board itself in a case that is quite similar to this reached the same conclusion that I reach. I refer to Local No. 2265 against Carpet Center, Inc., Case No. 7-CC-397, in which the facts are quite similar.

I would say this: that this one was somewhat stronger than the case at bar in that there was a closer relationship between the petitioner and the carpet layers. But, in the course of the trial, the examiner went on the ground that this was in substance, in reality, an employee relationship.

I do not think that I have to so find. I think that it's sufficient to find and determine and hold as I do that Sears is vitally interested in the price—in the installation price. The installation price was the big element in the total price that was charged the customer. And so, it was vitally interested in whether or not the installers were members of the respondent union. They were not strangers. They were not innocent neutrals. And consequently, I do not see that this case is one for the issuance of injunction, which is extraordinary relief, even though it is statutory. I agree it is. I see little probability that when this matter comes before the Board that [10] the relief that is sought will be granted.

That being the case, I do not think that the petitioner makes out a case for temporary injunctive relief here.

So, the request of the petitioner will be denied and the Complaint will be dismissed and the cause of action will be dismissed. This is a final judgment.

UNITED STATES DISTRICT COURT

For the District of Colorado.

CLYDE F. WAERS, Regional Director of the Twenty Seventh Region of the National Labor Relations Board; for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*.	Civil Action No. C-1052.

JUDGMENT OF DISMISSAL.

[Filed October 2, 1968.]

This Case having been tried to the Court on September 10, 1968, and the parties having requested and been granted leave to file post trial briefs in support of their respective positions; and the Court having considered the evidence and the arguments and briefs of counsel, and being sufficiently advised in the premises, having given its oral opinion and decision in the case on September 27, 1968, and on this date

DOTH FIND AND CONCLUDE:

1. The Court has jurisdiction over the parties and the subject matter of this action by virtue of Sec. 10(1) of the National Labor Relations Act as amended, 29 U. S. C. § 160(1).

2. It does not appear from the evidence that there is any probability that the National Labor Relations Board will ultimately find that respondent has engaged in an unfair labor practice under Sec. 8(b)(4)(B) of the said Act (29 U. S. C. § 158(b)(4)(B)).

3. This is not a proper case in which to grant injunctive relief under Sec. 10(1) of the said Act.

IT IS THEREFORE THE JUDGMENT OF THE COURT that the petition herein and this action be, and hereby are, dismissed.

DONE at Denver, Colorado, this 1st day of October, 1968.

BY THE COURT:

s/ WILLIAM E. DOYLE,
District Judge.

Approved as to form:

s/ RICHARD J. WISE,
Attorney for Petitioner

United States District Court

For the District of Colorado.

Title omitted in printing.)

NOTICE OF APPEAL.

Notice is hereby given: That Sears, Roebuck & Co., Complainant before the National Labor Relations Board, the Petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment of Dismissal entered in this action on October 1, 1968 and filed on October 2, 1968.

Rothgerber, Appel & Powers,
By Donald L. Giacomini,
2930 Security Life Building,
Denver, Colorado 80202, 222-3526,

Nalvin Grove,
of Lederer, Barnhill & Fox,
111 West Washington Street,
Chicago, Illinois 60602,

Stefan Smetana,
325 South Homan,
Chicago, Illinois,

Attorneys for Appellant, Sears, Roebuck & Co.

[Filed November 20, 1968.]

[Certificate of service omitted in printing.]

IN THE UNITED STATES COURT OF APPEALS

For the Tenth Judicial Circuit

SEARS, ROEBUCK AND CO., *Appellant*, vs. CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, AND CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, *Appellees*.	Civil Action No.

DOCKET STATEMENT

[Filed January 8, 1969.]

Pursuant to Rule 9 of the Revised Rules of the United States Court of Appeals for the Tenth Circuit, Appellant submits the following Docketing Statement.

1. NATURE OF THE PROCEEDINGS:

Appeal is taken from the oral opinion and judgment of dismissal of United States District Judge William E. Doyle, denying injunctive relief under Section 10(l) of the National Relations Act, as amended, 29 U. S. C., Section 160(l).

2. DATE OF THE ORDER AND JUDGMENT:

The oral opinion was rendered on September 27, 1968, and the judgment of dismissal was dated October 1, 1968.

grant injunctive relief," and dismissed the petition and action.

The Regional Director has not filed an appeal from the adverse decision. However, Sears, characterizing itself as "charging party and complainant before the [Board]", has filed this appeal from the oral opinion and judgment of dismissal below. The Union has filed a motion to dismiss the appeal, or in the alternative to affirm the judgment of the district court. As the appeal is not properly before this Court, an affirmance or reversal of the judgment below is not warranted. However, we submit that the appeal should be dismissed because Sears has no standing to prosecute this appeal.

1. Sears was not and is not a party to the injunction proceeding. The general rule is well established, that only a party litigant can appeal from a judgment of a district court. See *United States ex rel. State of Louisiana* v. *Jack*, 244 U. S. 397, 402 (1917); *United States* v. *McFadden Express, Inc.*, 310 F. 2d 799, 801 (C. A. 2, 1962); *First Iowa Hydro Electric Cooperative* v. *Iowa-Illinois Gas & Electric Co.*, 245 F. 2d 630 (C. A. 8, 1957); *Fenner Business Schools, Inc.* v. *School of Speedwriting, Inc.*, 234 F. 2d 1, 3 (C. A. 1, 1956), cert. denied 352 U. S. 942; *United States* v. *Seigel*, 168 F. 2d 143 (C. A. D. C., 1948); 9 Moore's Federal Practice, para. 73.04.

2. Sears has no standing to intervene as a party plaintiff or to file an appeal from an order denying injunctive relief in a proceeding under Section 10(l) of the Act. Section 10(l) of the Act provides in pertinent part that:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.

> If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law:
>
> . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: . . .

Section 10(l) of the Act constitutes a grant of power to the Board to obtain interim injunctive relief against conduct violative of specified provisions of the Act pending the final outcome of Board litigation. The injunctive relief contemplated by the Section is ancillary to Board proceedings and the power to seek such relief is vested exclusively in the Board. Accordingly, Sears has no standing to file an appeal and thereby to petition this Court to grant the injunctive relief which was denied by the court below. Compare *Phillips* v. *United Mine Workers, District 19*, 218 F. Supp. 103 (E. D. Tenn., 1963); *Douds* v. *Wine Liquor & Distillery Workers Union*, 75 F. Supp. 447, 448 (N. D. N. Y., 1948); *Shore* v. *Building and Construction Trades Council*, 50 LRRM 2139 (W. D. Pa., 1962); *Reynolds* v. *Marlene Industries Corporation*, 250 F. Supp. 722 (S. D. N. Y., 1966); *Penello* v. *Burlington Industries*, 54 LRRM

2165 (W. D. Va., 1963). In several cases involving appeals from injunctions under Section 10(l) or its statutory counterpart, Section 10(j),[2] Courts of Appeals have refused to permit the charging party before the Board to intervene as a party-appellee, when the Board has opposed such intervention because of lack of standing: *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525, 528 (C. A. 9, 1965); *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, Appeal Nos. 22767, etc. (C. A. 9), unreported order rescinding order permitting intervention by charging parties entered May 31, 1968, cert. denied *sub nom. Los Angeles Herald Examiner* v. *San Francisco-Oakland Newspaper Guild*, U. S. , October 28, 1968; *Firestone Synthetic Rubber & Latex Company* v. *Potter*, Appeal No. 25577 (C. A. 5), unreported order denying motion to intervene entered January 19, 1968. To our knowledge, no Court of Appeals has permitted intervention by the charging party in a Section 10(l) or 10(j) appeal when the issue of such intervention has been litigated by the Board.

3. The rights of a charging party in a Section 10(l) injunction proceeding are limited to appearance by counsel and presentation of relevant testimony; and the charging party cannot, by intervention or otherwise, seek injunctive relief independently of the Board.

Sears, by describing itself as "an aggrieved party and a charging party before the [Board]" (Amended docketing statement, p. 1), apparently intends to rely on *Automobile Workers* v. *Fafnir Bearing Company*, 382 U. S. 205 (1965), as authority for the filing of this appeal. Such reliance is misplaced. That case does not deal with temporary in-

2. Section 10(l) imposes on the Board a mandatory duty to seek injunctive relief whenever a complaint is to be issued alleging unfair labor practices covered by that Section, such as secondary boycotts, whereas 10(j) gives the Board discretion to seek injunctive relief when a complaint is issued involving other unfair labor practices.

junction proceedings under Section 10(l) of the Act. In *Fafnir* the Supreme Court dealt solely with the right of a party filing an unfair labor practice charge to intervene in the court of appeals proceeding which reviews or enforces the final Board order. The Act, in Sections 10(e) and (f), gives the Board authority to petition a court of appeals to enforce a Board order and also authorizes the "aggrieved party," the losing party before the Board, to seek review of the order in the court of appeals, but it does not expressly refer to the rights of the successful party before the Board in an enforcement or review proceeding before a court of appeals.

In permitting an "aggrieved party" to petition a court of appeals for review of a Board order, the statute in effect permits a charging party before the Board whose charges have been dismissed by the Board to apply to a court of appeals for the ultimate injunctive relief which the Board felt was not warranted. A court of appeals decree enforcing a Board order is, of course, in the nature of an injunctive decree. A Board order is not self-enforcing. When it issues an order and petitions a court of appeals for enforcement thereof, it is seeking a court injunction. When the Board dismisses the charges but the "aggrieved party" petitions for review in a court of appeals it, in effect, is seeking a court injunction. In affording the "aggrieved party" such right to petition for review, the statute confers upon that private party the right to seek a court injunction. In short, the statute expressly recognizes this limited exception to the proscription of the Norris-LaGuardia Act, 29 U. S. C. A. Sec. 107, against the grant of injunctions in labor disputes at the request of private parties.

Sections 10(e) and (f) of the Act, however, although specifically referring to the "aggrieved party" make no reference to the rights of the successful party in the pro-

ceeding before the Board. Noting that in this connection the Act was "silent on the intervention problem", the court looked "to the statutory design of the Act" and concluded that "Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board decision." (382 U. S. at pp. 208-210). The reasons for the court's decision are fully set forth therein and need not for present purposes be described. It is essential to note, however, that in the *Fafnir* case the Supreme Court was construing Sections 10(e) and (f) of the Act which deal with the ultimate, final, court injunctions following a Board decision in which all parties concerned had the right to fully litigate the merits of the charge; and the case did not involve a temporary injunction ancillary to the Board proceedings, which does not require full and complete litigation of all pertinent issues, a proceeding which contemplates that the parties will still have their day in court before the Board and in the court of appeals under Section 10(e) or (f), but recognizes that in the interim a temporary injunction is required to prevent injury to the public welfare.

Unlike Sections 10(e) and (f), Section 10(l) is not silent as to the rights of the parties. The charged party, of course, has the right to fully defend against a petition for an injunction in the proceedings before the district court; and the statute expressly gives the charging party the right to appear and present all relevant testimony. This limited right conferred upon the charging party, the right "to appear by counsel and present any relevant testimony" was deliberately designed by Congress to limit the rights of a charging party in an injunction proceeding under Section 10(l) to do just that and no more, i.e., to appear and present relevant testimony. The legislative history and the decisions of the courts make it abundantly clear that al-

though the scheme of the Act was to permit private parties full participation with all the rights of private parties in the proceedings before the Board and subsequent proceedings in a court of appeals, Congress deliberately limited the rights of the charging party to the presentation of relevant testimony in proceedings to secure a temporary, ancillary injunction, for "the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." *McLeod* v. *Mechanics Conference Board*, 300 F. 2d 237, 242-243 (C. A. 2, 1962). Compare *Dunn* v. *Retail Clerks*, 307 F. 2d 285, 288 (C. A. 6, 1962); *Meekins* v. *Boire*, 320 U. S. 445, 448 (C. A. 5, 1963).

4. As the Court pointed out in *Meekins, Inc.* v. *Boire*, *supra*, at p. 448, the "Norris-LaGuardia Act specifically prohibits the issuance of injunctions in labor suits except under certain circumstances which are not here alleged." 29 U. S. C. A. Sec. 107. With the exceptions not here relevant, the statute deprived the district courts of jurisdiction to issue injunctions against strikes or picketing by labor unions in support of a labor dispute. It is well settled that when Congress, in enacting Section 10(l) returned to the district courts a measure of jurisdiction to issue injunctions in certain labor dispute situations, such jurisdiction was limited to injunctions "obtained only at the instance of the National Labor Relations Board . . ." and not private litigants. *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 204 (1962). See also, *Meekins* v. *Boire*, *supra*, 320 F. 2d at 448-449; *McLeod* v. *Mechanics Conference Board*, *supra* 300 F. 2d at 242-243; *Int'l. Longshoremen's Union, Local 6* v. *Sunset Line & Twine Co.*, 77 F. Supp. 119 (N. D. Cal. 1948); *Amazon Cotton Mills Co.* v. *Textile Workers Union*, 167 F. 2d 183,

186-187 (C. A. 4, 1948); and cases there cited. When Section 10(l) first was enacted, in 1947, Congress debated this very point and expressly rejected a House proposal to permit injunctons "at the request of private persons." House Conf. Rept. No. 510, on H. R. 3020, p. 57; 1 Legislative History of LMRA, 1947, p. 561. "Congress was intent upon taking the Federal courts out of the labor injunction business except in the very limited circumstances left open: . . ." *Marine Cooks Union* v. *Panama S. S. Co.*, 362 U. S. 365, 369 (1960). See also *Meckins* v. *Boire*, *supra* 320 F. 2d at 448; *Dunn* v. *Retail Clerks*, *supra* 307 F. 2d at 288.

Because the Norris-LaGuardia Act is "such a longstanding, carefully thought out and highly significant part of this country's labor legislation" (*Sinclair Refining Co.* v. *Atkinson*, *supra*, 370 U. S. at 203) the Supreme Court has consistently stricken down attempts to restrict, modify or dilute its impact by judicial interpretation.[3]

Congress has been specific where it intended to permit private litigants an exception to the Norris-LaGuardia ban. Thus, Section 302 of the Labor Management Relations Act (61 Stat. 157, 29 U. S. C., Sec. 186) prohibits certain employer payments to employee representatives, and, in recognition of the unusually sensitive and important nature of the problem, expressly permits private litigants to seek an injunction without regard to Norris-LaGuardia. See, Sec. 302(e), 29 U. S. C., Sec. 186(e). But this section "stands alone in expressly permitting suits for injunctions . . . by private litigants . . ." (*Sinclair Refining Co., supra*;

3. See, e.g. *Sinclair Refining Co., supra*; *Marine Cooks, supra*; *United States* v. *Hutchinson*, 312 U. S. 219 (1941); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91 (1940); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938); *Lauf* v. *Shinner*, 303 U. S. 323 (1938). See also *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 805 (1945).

370 U. S. at 205, n. 19). Accordingly, no additional exceptions should be implied by the courts for the Norris-LaGuardia Act "leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself." (*Sinclair Refining Co., supra*, 370 U. S. at 202).

We submit that logic and reason compel the conclusion that if a private litigant is barred from seeking an injunction by way of an independent suit, as in the *Sinclair* and *Meekins* cases, *supra*, he cannot utilize intervention as a guise to secure relief independently of the Board. Plainly, where the Board has obtained injunctive relief in a proceeding under Section 10(l) of the Act, to permit a private party, by means of intervention or otherwise, to seek independent relief, for example, instituting contempt proceedings, opposing dissolution of the injunction, or as in the instant case, filing an appeal from the denial of an injunction, would for all practical purposes convert the limited permissible statutory scheme into the prohibited private law suit. Thus the Supreme Court has held that private parties who initiated unfair labor practice charges may not prosecute a contempt action against the charged party in a Court which enforces the Board order; and the courts of appeals and district courts have held that in a Section 10(l) proceeding the charging party is precluded from intervening to obtain such relief. See *Amalgamated Utility Workers* v. *Consolidated Edison*, 309 U. S. 261 (1940); *McLeod* v. *Mechanics Conference Board*, *supra* 300 F. 2d at 242-3; *Phillips* v. *United Mine Workers, District 19*, *supra* 218 F. Supp. 103; *Shore* v. *Building and Construction Trades Council*, *supra* 50 LRRM 2139 (W. D. Pa.). Cf. *Retail Clerks* v. *Food Employers Council*, *supra*, 351 F. 2d at 528.

For the foregoing reasons, it is respectfully submitted that the appeal be dismissed.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

JAMES T. YOUNGBLOOD,
Supervising Trial Attorney,

MARVIN ROTH,
Attorney,

National Labor Relations Board,
1717 Pennsylvania Avenue, NW.
Washington, D. C. 20570

February, 1969

[Affidavit of service omitted in printing.]

IN THE UNITED STATES COURT OF APPEALS

For the Tenth Circuit.

[Title omitted in printing.]

RESPONSE OF APPELLANT SEARS, ROEBUCK AND CO. TO MOTIONS OF APPELLEE AND PETITIONER TO DISMISS ITS APPEAL.

COMES NOW Sears, Roebuck and Co., Appellant, (hereinafter called Sears) and makes this Response to the Motions of Appellee Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, (hereinafter called the Union), and Petitioner Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, (hereinafter called the Regional Director) to dismiss Sears' Appeal in this proceeding for lack of standing.[1]

Upon a charge filed by Sears with the Regional office, and pursuant to the direction of Section 10(l) of the National Labor Relations Act, 29 U. S. C. Section 160(1), on August 29, 1968, the Regional Director filed a petition for a temporary injunction to restrain the Union from engaging in described unlawful picketing of Sears. The Regional Director alleged and supported his belief that there was reasonable cause to believe that the Union had engaged in such unlawful conduct. Nonetheless, the District Court refused to grant the requested injunction. Despite the Regional

1. The Union's Motion under Rule 10 of this Court, also sought the affirmance of the District Court's decision from which Sear's Appeal was taken. Inasmuch as Sears is filing its Brief in support of its Appeal concurrently with this Response, we will not here address ourselves to that portion of the Union's Motion, but instead we refer the Court to our Brief which deals in detail with the Union's contentions.

Director's conclusion that such "reasonable cause" did in fact exist, and despite the absence of any subsequently discovered evidence to the contrary, the Regional Director failed to appeal the District Court's decision.[2] The Union's unlawful picketing continued thereafter,—and still continues. Accordingly, on January 8, 1969, Sears, the aggrieved Charging Party, filed its appeal of the District Court's decision.

Each of the Motions to Dismiss is predicated, in general, on two propositions. *First*, since Sears did not seek and was not granted formal intervention before the District Court, it cannot thereafter prosecute an appeal of that Court's decision, and *second*, since the right to obtain injunctive relief is restricted to the National Labor Relations Board, therefore Sears, as a private party, lacks standing to prosecute an appeal from a refusal to grant an injunction.

I. Introductory.

In arguing that Sears cannot appeal from the District Court's decision because it had not been granted the right to intervene there, each Motion therefore seems logically to imply that such an appeal would have been proper had intervention been sought and granted. However, if such an appeal represents an effort to secure an injunction which is permissible only to the National Labor Relations Board, as both Motions also argue, then it becomes totally irrelevant whether or not Sears, a private party, had intervened. Neither Motion deals with this logical and concep-

2. After a formal hearing on the merits, a Trial Examiner of the National Labor Relations Board concluded on February 6, 1969, Labor Board Case No. 27-CC-278, that violations of the law as alleged by the Regional Director's injunction petition had in fact been committed by the Union. The issuance of this decision has had no effect on the Union's picketing of Sears. The Trial Examiner's decision is attached to Sears' Brief in support of its Appeal.

tual inconsistency. May a charging party never appeal from an adverse decision in an injunction proceeding? Further, on what basis may one conclude that an appeal testing the correctness of the District Court's decision is legally equivalent to an effort to institute an injunction action? Neither Motion argues the point although both assume that equivalence.

These illustrative observations highlight certain defects in the contents of both Motions: they argue largely without analytical rigor; they assume the conclusions which are central to the dispute; they seek to support their assumptions with voluminous citation of cases which are frequently unrelated to the issues; they rely on propositions which have been discredited by legal scholars and the weight of recent precedent; and they seek to perpetuate a formalistic denial of rights to charging parties before the National Labor Relations Board in the face of a discernible movement in the law to broaden the range of such rights.

In essence, the Motions to dismiss this Appeal and Sears' Response thereto place in issue before this Court the question of the nature and extent of charging parties' rights in Section 10(l) injunction proceedings, which question is an integral part of the larger issue of charging parties' rights generally. The quality of the discussion which this issue has engendered in some courts, particularly with reference to rights in injunction cases, is susceptible of the same criticisms as have been levelled against the Motions to dismiss in the instant proceeding.

In recognition of the importance of these matters, together with the need to substitute reasoned argument for sloganizing, Sears respectfully submits the following discussion in aid of this Court's consideration of an emerging and unsettled area of the law.

II. The Status of Charging Parties in Injunction Proceedings Under Section 10(l): the Legislative History of Section 10(l) and the Statutory Language.

A. Legislative History.

The debates preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the conflict between (i) the right of private parties to a speedy and effective remedy against the devastating effects of secondary boycotts and jurisdictional disputes, (ii) the need to retain the prohibitions against permitting courts to grant injunctions in labor disputes, as contained in the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U. S. C. §§ 101-15, and (iii) the need to preserve the scheme of the old Wagner Act in which procedures of the National Labor Relations Board were available for primary settlement of labor disputes. The nature of the conflict was clear. The speediest and most efficient manner for remedying an unlawful strike would be to permit the struck employer to seek an injunction without the delay inherent in awaiting the results of a hearing on the merits of the dispute before the Labor Board. Yet the abuses which had been occasioned by permitting employers to seek injunctive relief on their own motion, which abuses were thoroughly chronicled, for example, in *Frankfurter & Greene, The Labor Injunction* (1930), and which gave rise to Norris-La Guardia, were equally clear. Finally, despite the undoubted merit of a system whereby parties were required to resort to the procedures of a single expert agency for the resolution of their disputes, the need for some form of injunctive relief in aid of illegally picketed employers was also generally acknowledged.

By way of resolving these conflicting values, the House bill opted for permitting employers to move independently and unilaterally for injunctive relief.

> . . . The House bill [H. R. 3020], in section 12, provided for injunctions at the request of private persons, rather than by the Board, in [cases under Section 10(l)]. (*House Conference Report* No. 510, Leg. Hist. 561).

This provision was not adopted since it would have represented a substantial repeal of Norris-La Guardia. However, similar proposals were made in the Senate, evidencing the tangible support which existed for direct private injunctive relief.

Throughout the Senatorial debates on the Taft-Hartley amendments, one of the most serious and recurring disputes centered on the so-called Ball amendment. Senator Ball sought to convince his colleagues that private parties should be permitted to seek court injunctions whenever they were individually aggrieved by secondary boycotts and jurisdictional disputes, and without prior recourse to the Board. It was argued that this was the best method for avoiding potential harm (Leg. Hist. 561-562, 1057-1058, 1350). As argued by a supporter of this amendment, Senator Donnell,

> "[An injured party] should be entitled to engage his own attorney, go into a court which he selects, and direct the conduct of his litigation." (Leg. Hist. 1353.)

In opposition to this amendment, Senators Morse and Ellender, among others, argued that it would essentially repeal the Norris-La Guardia prohibition on injunctions in labor disputes. They argued further that for all matters reasonably cognizable under the labor laws, recourse should be had first to the Board rather than to proceed directly to the courts (Leg. Hist. 1057-1958, 1149, 1544). The Ball amendment, representing an extreme view of the manner in which the conflicting values should be resolved, was defeated sixty-two to twenty-eight (Leg. Hist. 1370).

The statute, as ultimately adopted, predictably repre-

sented a compromise. In order to provide a meaningful remedy for employers faced with unlawful picketing, injunctive relief was provided. However, in order to avoid a situation in which employers could forum-shop or achieve an independent development of the law through *their* selection of theories of violation and relief, *i.e.*, the abuses which gave rise to Norris-La Guardia, the right to *initiate* injunction suits was limited to the Board. Thus, Congress sought to afford employers an injunctive remedy while preserving the National Labor Relations Board's principal role in the labor field by confining to the Board's judgment both the identification of the cases in which injunctive petitions should be filed and, necessarily, the nature of the violations to be alleged and the limits of the relief to be sought therein.

The significance of this legislative background to the issue of the extent of charging parties' rights in injunction proceedings is threefold:

1) There existed substantial Congressional support for the proposition that charging parties before the Board who were victimized by illegal picketing should have a *right* of access to the courts in order to obtain relief and protection from such conduct.

2) Concern over a possible emasculation of Norris-La Guardia resulted in a compromise in which charging parties were prohibited only from *instituting* suits for injunction; no limitation on their *right* otherwise to participate in court proceedings in furtherance of such petitions, when filed by the Board, was either expressed or implied.

3) Since Section 10(l), as ultimately enacted, represented a compromise, as much of the contentions of the opposing sides as are consistent with the final enactment should be imported into its interpretation.

It follows, therefore, that Section 10(l) should be read to constitute charging parties before the Board as judicial "parties" in injunction proceedings in the courts whenever the Board has filed a petition for such relief. The charging parties' status as "parties" would include all the customary rights of parties or interveniors such as the right to appeal an adverse decision of the Court. Such an interpretation,—apart from giving effect to the equitable truism that one whose initiative and interest gives rise to a court proceeding and whose personal and property interests are vitally effected by its outcome should have a right to appeal an adverse ruling,—similarly gives effect both to the views of those legislators who sought to limit encroachment on Norris-La Guardia by preventing private parties from freely instituting injunction proceedings on their whim, and those others who sought to guarantee private parties the right to full access to the courts as the best means for protecting their vital interests.

B. The Statutory Language.

The conclusions we have stated regarding Congress' purpose to accord charging parties in 10(l) cases full rights of participation as "parties" in court proceedings instituted by the Board is reflected in the language of the statute. Section 10(l) which requires the Regional Director to file a petition for temporary injunctive relief whenever he has reasonable cause to believe that a union has engaged in enumerated unlawful acts of a particularly damaging nature to the affected employer, makes the following provision for participation by the charging party in the court proceedings:

> Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging*

party, shall be given an opportunity to appear by counsel and present any relevant testimony. (Emphasis added.)

The rights of participation which are thus granted to charging parties substantially exceed those associated with an amicus status. While an amicus is limited to the filing of briefs, the express provision of Section 10(l) permits charging parties to offer contentious evidence, to call witnesses, to introduce documentary and other matter, as well as to make oral argument and file briefs. Had Congress intended to relegate charging parties merely to the role of an amicus, either in proceedings in the District *or Appellate Courts*, its role would not have been expressly expanded to permit such full and active participation as a matter of right.

It is instructive, in this regard, to note the difference between the language of Section 10(j) and 10(l) of the statute. Both sections authorize the Board, through its Regional Director, to institute petitions for injunctions when the latter believes that charged unions have engaged in unfair labor practices rendering such extraordinary relief appropriate. The sections differ in that pursuant to Section 10(j), injunctive relief *may* be sought for any violation of the statute except for those few enumerated in Section 10(l). The latter section, however, provides that such injunctive relief *must* be sought upon the commission of the unlawful acts there specified.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition and be permitted to appear by counsel and present any relevant testimony, Section 10(j) requires only that charging parties be notified of the filing of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections is no doubt attributable to the fact that the unlawful acts referred to in Section 10(l) were con-

sidered to have the greatest possible potential for harm to their victims. It is manifest that Congress intended to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests,—a guarantee beyond the presence of and representation by the Board.

Indeed, if Congress believed that the judgment and participation of the Board in 10(l) injunction proceedings would suffice to protect the charging parties' interests, and that the charging party should have no independent role in the prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights on charging parties in 10(l) cases which were denied to those in 10(j) cases. The existence of a status in which charging parties are accorded an independent role in the protection of their recognized interests is inconsistent with a denial of their right to appeal a court's decision which is adverse to those interests. The denial of such a right would constitute also the denial of any independent status. It would create a situation in which the failure of the Board to appeal an adverse court decision, which failure might well be attributable to budgetary or manpower problems unrelated to the merits, would leave parties whose rights have been violated without means for remedying those violations.[3] It would, in short render meaningless Congress' deliberate distinction be-

3. It is true of course, that charging parties' allegations that they had been victimized by an illegal boycott or strike will ultimately be litigated in formal adversary proceedings. In this sense a remedy is afforded notwithstanding the denial of injunctive relief. However, this litigation, first before a Trial Examiner, then on review to the Board, extends over many months. When a boycott or strike does irreparable harm to the employer, as the Board's petition for an injunction as well as the statute's provision for injunctive relief admits, then a final order after so protracted a period constitutes no remedy at all. A victory before the Board, without earlier temporary injunctive relief, would consist of a pyrrhic victory few employers would survive to enjoy.

tween the rights conferred on charging parties in 10(j) and 10(l) cases. It follows, therefore, that Congress intended to accord charging parties in 10(l) cases the status of "parties", clothed with the rights of that status, including the right of appeal.

This conclusion finds support in the language of the Board's own "Rules and Regulations" which define the identity and rights of "parties".

Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the act, . . ."

Section 102.38, entitled "Rights of parties", provides as follows:

> "Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, . . ."

Section 101.10, defining parties' rights in formal hearings, provides that:

> ". . . all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner."

According to the Board's Rules, therefore, charging parties are deemed "parties" in interest in Board proceedings, and the rights which they possess as "parties" are identical to those conferred on charging parties in Section 10(l). Put somewhat differently, "parties" before the Board are conferred no rights in the Board's Rules which are denied to charging parties in Section 10(l), it be-

comes exceedingly difficult to understand, consequently, how the Board can argue, as it does in its Motion to dismiss in this case, that the enumerated rights to participate in the proceedings of the District Court granted to charging parties in Section 10(l) constitutes them as less than "parties" in the court.

The more reasonable view, it is submitted, is that the use of virtually the same language by the Board and by Congress to confer the same rights should be understood to achieve, and to have intended to achieve, the same legal status. And just as parties before the Board may appeal adverse Board decisions to the Courts of Appeals, so also parties in 10(l) proceedings should be permitted to appeal adverse District Court decisions, all as a consequence of their status as "parties".

It follows further, that those who have by statute been made "parties" in District Court proceedings are not required to seek intervention in that Court. Thus, Sears' failure to have sought and secured such an order from the District Court in the instant proceeding does not bar it from prosecuting this appeal.

III. The Relevant Authorities.

Apart from the legislative history of Section 10(l) and an analysis of its language, the principal support for Sears' position comes from two recent decisions which render much of the earlier case law obsolete. These are *Retail Clerks Union, Local 137, et al.* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), and *Automobile Workers* v. *Scofield (Fafnir Bearing Co., et al.)*, 382 U. S. 205 (1965).

Each of these authorities dealt with the question of the rights of charging parties before the Board to participate in the proceedings to which their charges gave rise.

A. The Retail Clerks Case:

In *Retail Clerks*, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter the Regional Director executed a stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this stipulation in the District Court and sought to have its injunction petition dismissed. The charging parties objected to the stipulation and the dismissal of the petition. The District Court granted the injunction as requested by the charging parties and over the objection of the Regional Director. Moreover, when the charging parties objected to the scope of the injunction as granted, the Court modified its order in conformity with their request. The Regional Director and the union then appealed from the injunction order as modified.

In its appeal the Board argued that since the Regional Director alone is authorized to petition for an injunction under 10(l), and since the Regional Director determined not to do so subsequent to the filing of his petition, the District Court was therefore without authority to grant an injunction over his objection and at the request of the charging parties. To do so, continued the Board, would permit charging parties to secure injunctive relief in violation of the prohibition of the Norris-LaGuardia Act. In essence, these arguments are identical to those which are being urged upon this Court in both the Union's and the Petitioner's Motions to dismiss.

In rejecting these arguments, the Ninth Circuit's opinion, which affirmed the District Court's decision, made a number of points which are equally apt here, as that Court explored

the subject of charging parties' rights in 10(l) proceedings[4]

1. Section 10(l) makes it mandatory for the Regional Director to file for an injunction when he has reasonable cause to believe that the charging parties have alleged a violation of law covered by that Section. The Norris-LaGuardia Act prohibits courts from granting injunctions only when private charging parties file the injunction petitions in the first instance. Once such petition has been filed by the Regional Director, however, charging parties are free to pursue the objective of securing such an injunction so long as the theories and relief which they urge are consistent with the objectives of the Regional Director's petition. And courts may grant such petitions on the urging of the charging parties irrespective of the position taken by the Regional Director after the petition is filed.

Thus the Court made a critical distinction which the Board ignores; there is a legal difference between (i) instituting an injunction suit, and (ii) supporting it, whether or not such support is desired by or is consistent with subsequent positions taken by the Regional Director. Since Norris-LaGuardia is irrelevant to the issue of *support* of a filed petition, that statute neither prevented the charging

4. In the Appellate Court the various charging parties made motions for intervention which were denied by the Court. Neither the grounds upon which the motions were based nor those upon which the Court denied them are stated in the opinion. It is difficult, therefore, to determine the significance of this ruling, particularly since the thrust of the Court's discussion of the issue of charging parties' rights suggests that they should be accorded the status of "parties" in the District Court. It is most likely that the charging parties failed to argue that they constituted "parties" in the District Court; indeed appellants are aware of no case in which this argument, as supported in this Response, has been propounded to a Court for its consideration. To that extent, this appears to be a case of first impression. It is difficult to see, however, given the reasoning of the Court in *Retail Clerks*, how that Court could have avoided making such a finding had it been urged and supported.

parties' independent urging of an injunction in *Retail Clerks*, nor could it prevent Sears' appeal of the failure to grant an injunction here. In both cases, the charging parties' actions are in support of the petitions as originally filed by the Regional Director.

2. After disposing of the Board's arguments predicated upon Norris-LaGuardia, the Court turned its attention to further arguments based upon the scheme of the National Labor Relations Act. The fact that injunctive relief pursuant to Section 10(l) is ancillary to subsequent proceedings before the Board gives no support to the notion, urged by the Board both in *Retail Clerks* and here, that only the Board, through a Regional Director, may determine the extent or the length to which an injunctive remedy should be sought. The Court reminded the Board, in *Retail Clerks*, that:

> "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they should be enjoined *whenever a district court has been shown* reasonable cause to believe in their existence and finds that the threatened harm or disruption can best be avoided through an injunction. (Citations omitted.) It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair practices for those of Congress." (Emphasis by the Court.)

By denying to the Regional Director the exclusive authority to determine whether to pursue or to persist in efforts to secure injunctive relief subsequent to the filing of his petition, the Court disposed of the primary conceptual objection which has been raised to Sears' appeal in this proceeding. Sears, therefore, has the right independently of the Regional Director to pursue the Congressional directive of persuading the District Court that it has been shown

reasonable cause to believe that 10(l) violations involved have occurred or to seek to persuade the Appellate Court that such proof was made.

In final support of its view, the Ninth Circuit suggested an analogy predicated upon the scheme of the National Labor Relations Act. Once the General Counsel of the Board has "embarked upon the judicial process" by instituting a complaint, he may not thereafter control the Board's consideration of the issues in the controversy. Similarly, once the Regional Director determines the existence of reasonable cause and files his injunction petition, he should not thereafter control the court's consideration of the issues raised in his petition. In both instances Congress' purpose is satisfied when the Board or its agents institute actions resulting from the application of its delegated exclusive authority. Thereafter, the charging parties' interests entitle them to an independent participatory role. It is a feasible and logical extension of the Court's analogy to conclude that just as charging parties' interests in Board proceedings are such as to entitle them to appeal adverse Board rulings to the appellate courts, so also should their interests in 10(l) proceedings in the District Courts entitle them to a similar appeal. In both cases, charging parties seek only to test the correctness of an adverse decision while they support the Board pleadings to which their original charges gave rise.

3. The third principal point made by the Ninth Circuit was in response to the contention of the Board, repeated in both Motions to dismiss in this case, that charging parties should not be permitted to secure injunctions because to do so would permit them to usurp the function of the Board as the custodian of the "public interest." In this view, the securing of an injunction under Section 10(l) is an act in the "public interest" not in aid of the private interests of charging parties.

The Court's answer was unambiguous:

> "However, even if we agreed with the Regional Director that it was the charging parties who had procured the injunction, we cannot conclude that this would necessarily have constituted reversible error. The strict dichotomy between public and private interests which the Regional Director espouses in his effort to limit the participation of private parties has been subjected to well deserved criticism."

The concept that parties who are victimized by violations of law are without a legally cognizable interest in the enforcement of that law on their own behalf has indeed been discredited. See 3 Davis, Administrative Law, § 22.13, at 273-75 (1958); Jaffe, *The Public Right Dogma*, 59 Harv. L. Rev. 720, 726 (1946) ("private and public interests are, both in a substantive and procedural sense, aspects of the totality of the legal order"); Comment, *The Charging Party Before The N. L. R. B.: A Private Right In The Public Interest*, 32 Univ. of Chi. L. Rev. 786 (1965).

4. The final principal point made by the Court in *Retail Clerks* is encompassed in the following quotation:

> "We agree, and find no inconsistency in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."

This statement raises the issue of the options open to the charging party when the Regional Director fails to appeal an adverse decision of the District Court. Under such circumstances, in which "the NLRB is either unable or unwilling" to act, and in which the damage to the charging party which causes the injunction petition to be filed continues, there can be no sound and equitable basis for refusing to allow the charging party to appeal. This is true even if the charging party is not deemed to have "party" status in the court, but serves in the place of a party, the

Regional Director, who declines to protect the charging parties' interests.

B. The Scofield and Fafnir Cases:

These cases, decided approximately six months after *Retail Clerks*, offer support to Sears' position herein by analogy. The cases differ in that in the instant proceeding Sears contends it was conferred the status of a "party" in 10(l) cases by statute, whereas *Fafnir* concerned the successful charging parties' rights to intervene in proceedings to review and enforce Board orders.[5] *Fafnir* and

5. Should this Court reject Sears' contention that it is already a party in this proceeding, then Sears should be permitted to intervene here in order to prosecute this appeal. Since the Federal Rules of Appellate Procedure provide no fixed time limits for a Motion to Intervene, and the rules of this Court are silent on the question, there is no basis to depart from the established principle that the Federal rules should be liberally construed. *Clark v. Saiduska*, 205 F. 2d 915 (CA 7, 1953). Therefore, Sears' Notice of Appeal should be construed to constitute also its Motion to Intervene, as supported and amplified by its Docketing Statement filed in this Court. Such a construction would do substantial justice without causing surprise to any other party to the appeal.

There is ample precedent for such an order. Leave to intervene may be granted solely in order that the intervenor may prosecute an appeal. *Wolpe v. Poretsky*, 144 F. 2d 505 (CA 1, 1944), cert. den. 323 U. S. 777; *Turner v. Willard Fidelity & Gas Co. of N. Y.*, 157 F. Supp. 451 (DC, N. Y., 1957). Even absent a formal order granting intervention in the District Court, when the rights accorded to participants in the District Court are similar to those exercised by parties (as they were accorded to Sears via 10(l)), then such participants have standing to appeal as if they were, or had been made parties. *Smartt v. Coca-Cola Bottling Corp.*, 337 F. 2d 950 (CA 6, 1964), cert. den. 380 U. S. 934.

Finally, a motion of a person to intervene as a party appellant, although not a party in the District Court, should not be denied if sufficient reasons can be shown for allowing appellate intervention. *McKenna v. Pan Am Petroleum Corp.*, 303 F. 2d 778 (CA 5, 1962). In the instant proceeding such "sufficient reasons" are readily shown: Sears' damage by alleged unlawful acts was the basis of the suit in the District Court; the damage continues; a Trial Examiner's decision has confirmed that such damage was in fact the result of unlawful acts; the remedy Sears seeks by pros-

Scofield involved intervention rights rather than party status since, unlike the instance of 10(l), the statute was silent on the question of the right of successful parties before the Board to participate in court proceedings. Despite this difference, *Scofield* and *Fatnir* (hereinafter called *Scofield* for brevity) are relevant to the instant appeal since the reasons and supporting logic they provide for permitting intervention both support the right to appeal in this case and answer objections to permitting such an appeal which have been made by the Regional Director.

1. The Court's rationale for its holding favors not merely intervention but also appeal where the language of the statute may be reasonably susceptible of an interpretation permitting it.

> "The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review . . .
>
> "The purpose of the judicial review is consonant with that of the administrative proceeding itself—to secure a just result with a minimum of technical requirements . . ."

Indeed, the Court quotes with approval the conclusion of the report of the Advisory Panel on Labor Management Relations Law, S. Doc. No. 81, 86th Cong., 2d Sess. (1960), which contained a statement favoring the fullest appellate participation even for those who could not claim to be there of right:

> ". . . any party to N. L. R. B. proceedings should be allowed to intervene in the appellate proceedings. . . ." Page 17.

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ecuting this appeal is precisely that which the statute provides where such unlawful acts continue; the Regional Director has declined to appeal the District Court's refusal to grant this remedy; unless intervention is granted Sears will be unable to stop the continuing irreparable damage inflicted by the continuing unlawful conduct.

2. Further, the Court's belief in the *need* for intervention for successful charging parties in appellate courts applies equally to the need for appellate rights in Section 10(1) cases.

> "In fact, the Labor Board itself agrees that intervention by charged parties will not impair effective discharge of its duties and may well promote the public interest. The rights typically secured to an intervenor in a reviewing court—to participate in designating the record, to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari—are neither productive of delay nor do they cause complications in the appellate courts. Appellate records in Labor Board cases are generally complete, and whatever material the charged party may see fit to add to the appendix will not affect the burden in preparation. Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful . . . Participation in oral argument does not necessarily enlarge the total time allocated, since parties aligned on the same side are usually required to share the time.
>
> "On the other hand, an *amicus*—with the exception of the right to file a brief—might be unable adequately to present all the relevant data to the court."

3. To the extent that courts have relied on the concept that charging parties' direct involvment in Board-related proceedings is barred by the "public interest" nature of such proceedings, the Supreme Court disposes of that bar, citing *Retail Clerks, supra:*

> "In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interests', however, is

not to imply that the public right excludes recognition of parochial private interests.

"In short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather the two interblend in the intricate statutory scheme.

"While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that, since 1947, it serves substantially as an organ for adjudicating private disputes."

4. To those who would argue that either intervention or the right of charging parties to appeal in Section 10(l) proceedings would increase courts' burden, the Supreme Court provides a rebuttal:

". . . the need for centralized control over the agency hearings and the standards under which they operate is much greater at the administrative than the appellate level, where perforce an adequate record has been made for adjudication."

5. Throughout the decisions which the Board has cited in opposition to intervention in 10(l) cases, emphasis has been placed on the fact only the Board may inititate injunction proceedings. Such discussions have confused the right to initiate with the right to intervene after initiation. In *Scofield*, the Supreme Court addressed itself to this distinction in a manner which clearly favored intervention:

"We find nothing inconsistent in denying the right of a private party to istitute a contempt proceeding—where the Board's expertness in achieving compliance with orders is challenged—and on the other hand, in permitting intervention in a proceeding already in the court for decision."

It seems clear that when a charging party is already accorded the status of a "party" in the District Court, the same reasoning would permit it to appeal or to take any

other independent action not inconsistent with the provisions of the Board's petition.

6. Finally, the Court stated its belief that intervention of right by charging parties should be permitted in the appellate courts by analogy with the provisions of the Judicial Review Act, 5 U. S. C. § 1038:

> ". . . any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside or suspended, *may appear as parties thereto on their own motion and as of right and be represented by counsel* . . ." (Emphasis added).

and by analogy to Rule 24(a) (2) of the Federal Rules of Civil Procedure:

> "*Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In general, *Scofield* argues for maximum participation by charging parties in the appellate court proceedings which result from charges they had originally filed with the Board. And in the analogies the Court considers relevant to the statutes set out immediately above, the Court concedes its belief that the interests of charging parties in the appellate litigation of their cases entitle them to the status of parties in those proceedings.

In arguing the irrelevance of *Scofield* to the instant case, the Board emphasizes the fact that *Scofield* dealt with the review or enforcement of final orders under Sections 10(e) and (f) rather than the securing of temporary injunctive relief under Section 10(l). The Board's attempted distinction is without merit. First, *Scofield* argued in terms of

general truths concerning the right to be heard effectively. This does not depend upon whether the hearing is on a request for permanent or temporary relief. Second, Section 10(h) of the National Labor Relations Act exempts from the Norris-LaGuardia Act all federal court proceedings authorized under Section 10, including 10(e), (f), (j) and (l), so that no distinction between the nature of the relief sought can be attributed to the operation of Norris-La Guardia. Third, the basis for permitting charging parties to participate in proceedings under 10(e) and (f) apply equally to 10(l), *i.e.*, to prevent harm to the charging party through an adverse decision to which the charging party was not a full and effective participant. Damage to an employer who is unable to secure an injunction of an illegal strike is no less than damage he may suffer as a consequence of a final order of the Board. Surely, speculation as to the difference, if any, in the quantum of damage to be suffered cannot serve as the basis for denying the right to the fullest possible participation by the charging party.

It follows, therefore, that the logic of *Scofield* applies as well to cases under Section 10(l).

IV. The Authorities Cited by the Union and the Regional Director.

In general, these authorities fall into one of two categories; they are irrelevant to this appeal or they rely upon superceded or incorrect principles. Illustrative of the first group are cases such as *Meekins v. Boire*, 320 U. S. 445 (CA 5, 1963); *Dunn v. Retail Clerks*, 307 F. 2d 285 (CA 6, 1962); *Shore v. Building and Construction Trades*, 50 LRRM 2139 (W. D. Pa., 1962); *ILU v. Sunset Line & Twine*, 77 F. Supp. 119 (D. C. Calif., 1948); *Amazon Cotton Mills v. Textile Workers Union*, 167 F. 2d 183 (CA 4, 1948) and *Bakery Sales Drivers Local Union v. Wagshal*, 333 U. S.

437 (1948). In each of these cases, a private party had filed a petition for an injunction independently of any Board action. And each case stands for the proposition that a private party may not *institute* suits for injunction, that only the Board, through its Regional Directors, may do so. This priciple is not in dispute and does not require such extensive citation. More significantly, these cases do not address themselves to the distinction between *initiating* injunction suits and *supporting* such petitions subsequent to their filing. There is no dispute in this proceeding that the injunction petition had been filed by the Regional Director. The question of the extent to which charging parties may thereafter support the granting of an injunction, and in which courts they may do so, is discussed instead in *Retail Clerks* and *Scofield*, *supra*. None of the precedents cited by the Union or the Regional Director, such as are referred to above, constitute any basis or support for a dismissal of Sears' appeal.

Illustrative of the second category is *Phillips* v. *United Mine Workers, District 19*, 218 F. Supp. 103 (E. D. Tenn., 1963), which includes the major points made in the remaining authorities cited in the Motions to dismiss this appeal.

In *Phillips*, the Board and the respondent union moved jointly to dissolve an injunction. The employer sought to intervene and oppose the dissolution; he did not argue that he enjoyed the status of a party in the District Court but contended instead for permissive intervention. On its facts, therefore, this case is strongly analogous to *Retail Clerks*, *supra*. The District Court denied the employer's motion to intervene on three grounds:

1. The congressional policy to prohibit the issuance of injunctions upon the application of private parties would be thwarted if private litigants could "take over, control and conduct litigation initiated by the National Labor Relations Board."

2. Suits under Section 10(l) are in the public interest and do not merely vindicate private rights.

3. When the language of Section 10(l) states that a charging party may present "relevant testimony", it means only that, and a charging party does not thereby acquire full rights of intervention; otherwise the Board would lose the authority to control the Government's (*i.e.*, public) interests.

In the light of all which has already been said, it must follow that the Court's arguments no longer have any validity, if they ever did. Reliance upon the distinction between "public" and "private" rights and interests can no longer be supported. The same is true of the Court's failure to distinguish between institution of a petition and its support. The Court's fear of a "take over" by the charging party is totally unwarranted since, as *Retail Clerks* made clear, the charging party is limited to the allegations of the Regional Director's petition and theories and relief which are consistent therewith. In addition, the Court's effort to limit the participation of charging parties is in conflict with the decisions and arguments in *Retail Clerks* and *Scofield* which were discussed above. Finally, the Court's assertion, without citation or discussion, that the words of Section 10(l) mean only what they say, is an evasion; the Court failed to consider the legislative history which gave rise to those words; failed to consider the distinction in language between Sections 10(j) and (l) and the implications of those differences; failed to evaluate the consequences of similar "words" which create the status of "parties" in Board proceedings, and in general, failed to offer an analysis of these matters in lieu of asserting inappropriate and dated maxims.

By way of concluding this discussion of the authorities cited in the Motions to dismiss this appeal, it is appropriate to note two additional matters. The first is the Regional

Director's statement of belief that intervention has never been granted to charging parties in 10(l) cases where issue has been joined on that point. It is sufficient to cite, in response, two such cases in which charging parties sought intervention as a matter of right, although they unfortunately failed to take the next step of urging their status as "parties", and in which intervention was granted over opposition. *David* v. *Hotel and Restaurant and Bartender's International Union, Local 248*, No. 66-68[8] (D. C., Okla., 1966) (unreported but described in the Thirty-First Annual Report of the National Labor Relations Board at 155-6), and *Penello* v. *Plumbers Local Union No. 5*, 41 LRRM 2269 (D. C., Va., 1957), in which the Court held:

> "Section 10(l) of the Act plainly authorizes participation by the charging party. Intervention is necessary to implement this right." (Citations omitted.)

See also, *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (CA 2, 1966).

The second matter relates to the citation, in both Motions, of *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D., N. Y., 1966). That case involved a charging party's motion to intervene in a proceeding under Section 10(j) of the Act. The Court denied this motion on the grounds (i) that the presence of the Board's counsel was adequate for the representation of the movant's interests; (ii) that the statute gave no right to intervene; and (iii) that *Scofield* did not require the permitting of intervention since *Scofield* was concerned with the possibility of multiplicity of suits not present in *Reynolds*. This case is entitled to no reliance in the instant matter. First, the failure of the Regional Director to appeal the District Court's adverse decision obviously prevents the Board's representation from being viewed as "adequate" in the Appellate Court; second, the rights guaranteed charging parties in 10(j) are not the same as those guaranteed in 10(j), as has been discussed at

length above; and third, for the *Reynolds* Court to construe the discussion in *Scofield* of charging parties' rights to be limited to a concern over multiplicity of suits constitutes an irretrivably erroneous view of the Supreme Court's desire to expand the participation of charging parties in suits involving their vital interests.

V. The Expanding Awareness of the Role of Charging Parties.

The Ninth Circuit's decision in *Retail Clerks* represented an effort to move the discussion of charging parties' rights from the level of cliche to that of an awareness of their legitimate right to participate in proceedings governing their essential interests.

Scofield represented further movement in that direction as that Court acknowledged for the first time the right of successful charging parties to continue to represent their interests in appellate proceedings. In the course of doing so, the Supreme Court acknowledged the irrelevance of doctrines which had limited charging parties' participation since the early days of the National Labor Relations Act, such as the concept that the statute recognized and enforced only "public" rights.

Other courts have participated in this movement. In *Leeds and Northrup v. N. L. R. B.*, 357 F. 2d 827 (C.A. 3, 1966), the Third Circuit overturned a long-standing Board practice by declaring that charging parties were entitled to an evidentiary hearing on their objections to unilateral settlement agreements which the Board in its allegedly unreviewable discretion had regularly taken over the charging parties' futile objections. Henceforward, ruled that Court, charging parties were entitled to a record upon which they could seek appellate review.

Even the Board has recognized this development as, for

example, in *Spector Freight*, 141 NLRB 1110 (1963), in which it acceded to a greater role by the charging party in examining witnesses in Board hearings.

In light of this evidences of the current of the law, the instant Motions to dismiss Sears' appeal represent efforts to return to limiting and formalistic doctrines which have been increasingly discarded by our courts.

VI. Conclusion.

For the reasons argued and in reliance on the authorities discussed herein, Sears respectfully urges this Court to dismiss the Motions of the Union and the Regional Director to dismiss its appeal.

D. L. Graconmi,
Donald L. Graconmi,
2910 Security Life Building,
Denver, Colorado 80202.

Kalvis M. Grove,
Kalvis M. Grove,
111 West Washington Street,
Chicago, Illinois 60602,

Gerald C. Sinetana,
Gerald C. Sinetana,
925 South Homan Avenue,
Chicago, Illinois,

Attorneys for Sears, Roebuck and Co., Appellant

[Affidavit of service omitted in printing.]

TXD-(SF)-13-69
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Trial Examiners
Branch Office
San Francisco, California

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, and SEARS ROEBUCK AND CO.	Case No. 27-CC-278.

Mr. Richard J. Wise, Denver, Colo., for the General Counsel.
Mr. Philip Hornbein, Jr., Denver, Colo., for Respondent Union.
Lederer, Barnhill and Fox, by Mr. Kalvin M. Grove, Chicago, Ill., for Complainant Company.

DECISION OF THE TRIAL EXAMINER.

STATEMENT OF THE CASE.

Maurice M. Miller, Trial Examiner: Upon a charge filed and duly served, the General Counsel of the National Labor Relations Board caused a Complaint and Notice of Hearing to be issued and served upon the parties herein.

(The Complainant, Sears, Roebuck and Co. had filed the charge on August 9, 1968; General Counsel's Complaint issued August 29th. All dates cited within this decision refer to 1968, unless otherwise noted.)

Therein, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as Respondent Union herein, was charged with the commission of certain unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. Copies of the Complaint and Notice of Hearing were duly served upon the respondent labor organization. Within Respondent Union's duly filed answer, certain factual statements in General Counsel's Complaint are conceded; Respondent Union, however, denies the commission of unfair labor practices.

Pursuant to notice, a hearing with respect to the issues was held at Denver, Colorado, between October 8th and October 11th, before me. The General Counsel, Respondent Union, and Complainant were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues.

One day before the hearing closed, Respondent Union's counsel requested a subpoena for General Counsel's witness, Massey, who had previously been excused following the completion of his testimony; counsel then proposed his recall as Respondent Union's witness. While testifying first, in General Counsel's behalf, Massey had proffered certain testimony which a subsequent witness for General Counsel, Harris, partially contradicted. Respondent Union's counsel contended that Massey's further testimony with respect to the particular matters involved thus in contradiction, regardless of whether he maintained a disagreement with General Counsel's subsequent witness or resolved their clearly discrepant testimonial recollections, would be both relevant and material. The following day, when the parties' testimonial pre-

entations were, in all other respects, complete—the witness sought by Respondent Union's counsel had, presumptively, not been served: he did not present himself when called. Respondent Union's counsel, then, requested that the record be kept open and the hearing continued, so that Massey's further testimony, regarding the discrepancy between Harris' recollection and his, could be received at some later date. Following a record colloquy, I concluded that such further testimony depending upon its conceivable tenor would either be immaterial or merely cumulative. Counsel's request that the record be kept open and the hearing continued, therefore, was denied. Upon further consideration, I remain persuaded still, that this disposition of counsel's request has worked no prejudice, with respect to Respondent Union's defensive presentation. *N.L.R.B. v. Phoenix Instrument and Electronic Specialties*, 244 F. 2d 853, 59 LRRM 2175, 2178 (C.A. 9). My ruling is reaffirmed.

Since the hearing's close, comprehensive and well prepared briefs have been received from counsel for the General Counsel and Complainant; these have been duly considered.

Findings of Fact

Upon the entire testimonial record, documentary and film evidence received, and my observation of the witnesses, I make the following findings of fact:

I. Jurisdiction.

Sears, a New York corporation, maintains several related mercantile establishments both within and near Denver, Colorado, at five locations. Three of these are retail stores.

(Customarily, these are designated as the Cherry Creek store, Westland store, and Northglenn store, respectively.)

The firm, likewise, maintains a warehouse, with a separate catalogue service location. Respondent Union's course of conduct, challenged herein as violative of the statute, affected Complainant's Cherry Creek store and warehouse merely.

In the course and conduct of its business operations, Sears has sold and distributed—through its Cherry Creek store specifically—goods and products value in excess of $500,000 yearly. Likewise, Sears has purchased, transferred and delivered to its designated store, and warehouse, goods and materials, valued in excess of $50,000 yearly, which goods and materials were transported to Complainant's store and warehouse directly from states of the United States other than the State of Colorado.

Upon these facts, which are conceded to be correct, I find that Complainant is now, and has been throughout the period with which this case is concerned, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the statute. With due regard for those jurisdictional standards which the Board presently applies—see *Siemons Mailing Service*, 122 NLRB 81, 43 LRRM 1056, and related cases, I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. The Respondent Union.

Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, designated as Respondent Union within this decision, is concededly a labor organization within the meaning of Section 2(5) of the Act, as amended. Throughout the period with which this case is concerned, I find, George Cooney, Respondent Union's financial secretary and business manager, together with Paul Wishard and Richard Geisler, field representa-

tives, have been agents of the designated respondent, functioning on its behalf, within the meaning of Section 2(13) of the Act, as amended.

III. The Unfair Labor Practices.

A. *Issues.*

In connection with Sears' general mercantile operations, the firm sells floor coverings at retail. The floor coverings sold compass soft surface (carpet), together with hard surface (linoleum and tile), materials. In most cases, the firm sells not only the floor covering materials but likewise, whatever installation services may be required. The customer pays a single price, calculated to cover Sears' selling price for necessary materials purchased together with a labor selling price, plus any charges related to credit terms which the particular customer may request or require. Whenever Sears' floor covering sales compass installation work, responsible Sears representatives finally "assign" such work to various floor covering installers, under circumstances which will be noted.

This case derives from a series of picket line confrontations between representatives of Respondent Union, on the one hand, and, on the other, Joe Brase and Eddie Stimac, doing business as Joe and Eddie's Carpet Service Company, together with Sears, through its Cherry Creek store and warehouse specifically. Thereby, so General Counsel contends, the Respondent Union, through its representatives, induced and encouraged various Sears employees—together with individuals working for other persons engaged in commerce—to cease performing services for their respective employers. Further, General Counsel contends that Respondent Union likewise threatened, coerced, and restrained Sears, together with other persons engaged in commerce. Such conduct was undertaken so General

Counsel herein charges—with the unlawful object, in each case, of forcing or requiring Sears to cease doing business with Joe and Eddie's Carpet Service, and certain other floor covering installers variously designated. Respondent Union denies the statutory violations charged. Further, Respondent Union contends, affirmatively, that all floor covering installers working on Sears' jobs function as company workmen; that Sears fixes and controls their wages and working conditions; that those wages and working conditions are inferior to those generally prevailing throughout the floor covering industry within the Denver metropolitan area; that such wages and working conditions, therefore, jeopardize the prevailing standards for wages, hours, and working conditions set through collective bargaining for Respondent Union's members; that Respondent Union thus has a so-called primary labor dispute with Sears concerning the wages, hours, and working conditions which Complainant has fixed for floor covering installation workers; that Sears is not a neutral or disinterested party with respect to that dispute; and that Respondent Union's conduct, challenged herein as violative of law, should, therefore, be considered protected and concerted activity, on both statutory and constitutional grounds.

B. *Facts.*

1. Preliminary Statement.

How Floor Covering Is Sold.

At Sears' metropolitan Denver area stores, the specific department or division which handles floor covering sales is known as Division 37; such department or divisions are maintained at the Cherry Creek, Westland, and Northglenn stores.

Generally, prospective customers visit the floor covering department of some Sears store; there, they may

discuss with a salesman—preliminary—the type of floor covering they presumptively desire to purchase. The salesman, usually, tries to arrange a visit within the customer's home; when successful, he brings samples calculated to help the customer select whatever floor covering he may desire. Should the customer indicate that a complete job, with installation service, is desired, the salesman will prepare a Floor Covering Estimate and Proposal document; having seen the specific floor area or areas which the customer wishes covered, the salesman will calculate both the price of the carpet or hard surface covering materials required, and estimated material installation charges. Both figures will be noted, within appropriate spaces, on Complainant's Estimate and Proposal form.

(Six copies of the proposal are normally prepared. The copy titles vary from one copy to another; they correspond with the first copy, however, in most major respects.)

When the customer accepts his so-called "bid" proposal for both materials and labor, the salesman will normally draw a diagram of the space or spaces to be covered, within a graph marked section which the firm's Estimate and Proposal form provides. This drawing will show the rooms to be covered, the type of material required, and sometimes where seams should be sewn or laid.

Following the document's preparation—when a final consensus with the customer regarding various details, such as credit terms, has been reached—the complete Estimate and Proposal is signed, in multiple copies, by the parties. The salesman then returns the document, minus the customer's copy—together with a sales check—to Sear's store. The reverse side of the customer's retained copy of the proposal form—so the record shows—contains the following language:

> INSTALLATION. It is understood that Sears will not install said materials but that by the acceptance of this proposal you authorize Sears to arrange with a contractor licensed where required to make the installation; you authorize Sears (1) to issue to said contractor an installation work order with these specifications, (2) to inspect the installation upon completion thereof, and (3) to pay the contractor his charge for such installation upon your execution of a completion certificate establishing that the installation has been satisfactorily completed. You agree to pay to Sears the amount specified herein which will cover the price of said materials and the installation charges.

When the customer has proposed a credit purchase, the complete Estimate and Proposal is submitted to Sears' credit department for review. Likewise—whether or not credit terms must be approved—the proposal is submitted to the proper Division Manager; the latter, then, checks the document's correctness.

When the particular Estimate and Proposal has received the Division Manager's concurrence, the necessary document copies (Nos. 1, 2, 3, and 4 copies) are placed in a job folder, which is normally sent to Sears' warehouse installation department, or some particular store's customer service department, for further processing.

> (With respect to hard surface floor coverings—linoleum and tile—such processing is centralized at Sears' warehouse, under Installation Manager Donald Chandler's supervision. Chandler is responsible, likewise, for the processing of carpet installation orders received from Sears' Cherry Creek store. Sears' other store Division Managers, McNally at Westland and McGuire at Northglenn, are responsible for processing carpet installation orders which originate at their stores.)

The store salesman, generally next places an order for whatever materials may be required. Carpet is procured,

generally, from direct sources—that is, the carpet mills—or from Sears' pool stock warehouses. Linoleum and tile are normally carried in stock at the warehouse.

Following a sale's conclusion, the salesman generally gives the customer an approximate period within which the materials may be expected, and notes "three or four days thereafter" as the customer's estimated installation date. Normally, when the goods required have been made available either from Sears' warehouse or from some direct source—whether hard surface or soft surface materials are involved—the job folder concerned with the particular sale will be removed from a file for further handling, by a representative in Sears' warehouse, or store customer service department.

> (For present purposes, this description of Sears procedures, related to handling floor covering job orders, will be rather generalized. The process will be detailed further, *infra*, when the nature of the relationship between the Complainant and various floor covering installers must be reviewed.)

Sears' installation department or customer service representative, first, communicates with the designated customer, to determine the best, most appropriate time for material installation, consistent with both the customer's needs and the projected availability of required installers. When this determination has been made, the necessary installation work is assigned to some particular installer. Requisite copies of Sears' job documents—designated "General Order to the Contractor" specifically—are replaced in the job folder which the installer will subsequently procure; these folders are, then, placed within properly designated boxes or slots, depending on the store, for each installer's subsequent pickup.

(The Complainant maintains current working relation-

ships with some sixty installers; this number includes those who perform floor covering work. At Sears' warehouse, each of them has a pigeonhole within which their particular job orders are placed. At Westland, such job orders are made available within the store's customer service department.)

Most installers, generally visit the warehouse or particular store within which they do business, daily; at such times, they will customarily pick up their work orders. They then procure the material required for the job which they will be required to perform on any given day, proceed to the jobsite, and perform whatever work may be required.

When their particular jobs are completed, the installers concerned—pursuant to their more or less regular practice—submit one copy of Complainant's relevant Estimate and Proposal, together with their conventional Invoice form, for payment.

Hard surface floor covering—linoleum and tile—which Sears sells is normally installed by Frank Harris, doing business as Frank Harris Tile Company, and by Daryl Massey, doing business as Duke's Floor Covering; other linoleum and tile installers who sometimes receive work from Complainant herein, however, include Joseph Mozzicato, John Erpelding, doing business as Sea-Ro Tile Company, and Gerald Fallert, doing business as G. & H. Tile Company. Soft surface floor covering sold from Sears' Westland store has been installed by Joe and Eddie's Carpet Service Company. Before Respondent Union commenced the picketing with which this case is concerned, soft surface coverings sold through Cherry Creek were installed by Crown Carpet Service; since Respondent Union began picketing, however, Cherry Creek installations have been handled by Joe and Eddie's and by Paul E. Clark, d/b/a Clark Carpet Service. So far as the record shows,

without contradiction, reveals some variant practices in this connection. Sears has established no fixed reporting requirements; floor covering installers are not *required* to report at specific times, or even at all. Thus, with respect to Joe and Eddie's Carpet Service particularly, the record reveals: That the partners generally visit Sears' Westland Store daily, Mondays excepted, that, sometimes, they may perform work for other customers first, and then visit Complainant's store; that they do not, therefore, report at particular times; that they normally work about eight hours per day; that they do not themselves, receive overtime compensation from Sears or other customers should they work more than eight hours; but that they pay their own workmen overtime. Virgil Massey's comparable testimony, which stands without contradiction, warrants determinations: That he tries to pick up all of his assignments on Monday, for the coming week, that he normally works, thereafter, about thirty hours per week (on *all* his work), making some $10 per hour; that, when he does perform Sears' work, he normally stops to pick up his required materials between 8:30 and 9:00 o'clock, drinks coffee until 9:30 or 10:00 o'clock, then goes to work; that there are days when he performs Sears' work on which he has no contact with persons at Sears' premises.

None of the floor covering installers punch a time clock. So far as the record shows, should one not wish to work, he thereby incurs no duty.

[illegible] testified, works for Sears between 25-30 hours per week, he averages $80 per day for each day's work. He does not feel required to visit Sears daily; when he does so, he usually reaches the warehouse at 9:30 a.m. approximately.

procure the materials required for their installations. Such materials are procured directly, either at Sears' store dock or warehouse; the Complainant does not deliver floor covering, neither to the customer's jobsite or residence, nor to contractors. With respect to floor covering materials pickups, further, the record shows that Joe and Eddie locate, pick up and load their own materials at Sears' dock. They will sometimes pick up several days' work at one time; materials thus procured may be stored in their garages, or left on their truck. They have left Sears' material in their garages, sometimes, for a couple of weeks.

(When supplied by Sears, neither hard surface materials nor carpet materials are pre-cut or pre-sewn in any fashion. Carpet materials are received by these installation contractors in rolls which approximate the correct square yardage required for the particular job. All cutting and sewing is done within the customer's home.)

Sears does not supply any material to carpet layers save the carpet and pad materials which Complainant sells. When linoleum or tile is sold, Sears likewise sells the paste and metal fixtures required for installation; the hard surface material layer, however, supplies any required underlayment or base.

Sears' job tenders do not take into account such factors as where the material layers live; assignments are made on the basis of the installer's availability.

In that connection, further, the record shows that Joe and Eddie's Carpet Service does not work for Sears on Mondays, then works Tuesday through Friday each week. Comparably, Massey only works three days per week for

the present record have other customers within the Denver metropolitan area. Their charges may vary, as between customers, depending on their work. They can and do schedule significant amounts of work for their other customers on the same days they do Sears' work. When this is done, they may handle their several jobs in any order they choose, and need not perform Sears' work first. However, should a Sears' customer be promised some particular time of day for his work, the installers will *try* to meet that commitment.)

Normally, the person or department responsible for Sears' job tenders—with regard to floor covering installation work—takes into account whatever work load limitations particular installers may have set. Stating the matter otherwise, these installers are tendered jobs, daily, which will not exceed their own, previously stated, limitations. Thus, Joe and Eddie's Carpet Service, normally will be given jobs which require them to lay no more than roughly 100-150 yards per day. Massey and Harris—within the field of hard surface floor coverings—do about $60 worth of work per day; this normally represents about five-six hours of work. Joe and Eddie have, sometimes, further limited the amount of work which they will perform on a given day by telling the Sears' representative responsible for assignments to schedule only so much, or not to schedule any more jobs for that day than she already has. Sears —as far as the record shows—complies. Additionally, Joe and Eddie may determine, themselves, which of them will perform particular jobs tendered.

d. *How the Work Is Performed.*

When floor covering materials have been procured, the contractor concerned may proceed to the customer's home, or call the customer to arrange a time which is convenient

for him. He may likewise take the material home and leave it there, until he is ready to perform the work. Sears does not tell installers what customer to visit first, how early to arrive, or how late to stay; nor are directions given as to how the customer's home may be reached. The record shows—in this connection—that Joe and Eddie may, sometimes call Sears' customers and reschedule work with them, without notice to Complainant's store or warehouse. Likewise, they may make independent arrangements to come back to a customer's house the following day, should they be unable to reach a job or complete a job within a single day—all of this without notice to Sears' customer service or installation departments.

Massey, seemingly, follows a different procedure. Whenever he cannot reach a particular Sears' customer's job, he will call Sears and advise them, directly, regarding the job's postponement.

Installers receive no directions from Sears with regard to how floor coverings should be installed. They receive nothing more, with regard to particular jobs, than the salesman's rough drawn delineation of the specific room or living area within the customer's home to be covered.

> (The salesman's prepared Estimate and Proposal form may or may not have such a diagram. In any event, whatever diagram there may be is not drawn to scale. Rather than a specific direction to installers, with regard to how floor covering should be laid, it seemingly does little more than help the salesman in consummating the sale.)

Sometimes, with respect to carpet installations, the diagram will show where seams are to be located; carpet layers, however, are not required to follow the drawing. They often ignore it, and put seams elsewhere, when, within their judgment, that would make for a better job. They

may also modify the specified job in various other respects. When this is done—so far as Joe and Eddie is concerned—no notice is given Complainant herein, nor is prior clearance requested.

Though the contracts between Sears and various floor covering craftsmen require the latter to refrain from doing extra work for Sears' customers—such as taking up old carpet and relaying it within another room—without written authorization, the practice of most installers is clearly contrary. Joe Brase testified regarding two such instances, for which the customer paid directly; his testimony was corroborated, generally, by his partner.

> (Massey, when queried in this connection, testified that he tells the customer to call a Sears salesman, because the customer is usually looking for a cut rate.)

Harris, so his testimony shows, does such extra work occasionally; sometimes he even sells the customer material for such extra work from his own stock. Paul Clark—though he has only worked for Sears since August 1968, has performed work for Sears customers, beyond that specified on Sears' job proposal, three times. Sears, so far as the record shows, gets no notice, and takes no reprisals in such situations; nor has it promulgated a flat prohibition.

Upon occasion, when busy, Joe and Eddie's Carpet Service has subcontracted Sears work to another person; this, without Sears' prior knowledge. That person has been paid with partnership funds. Harris, likewise, has had Massey perform Sears' work when he has been unable to do so. Complainant, on this occasion, likewise received no notice; Harris sent in the bill, and thereafter paid Massey himself. Harris has, likewise, negotiated directly with a Sears' customer for installation work, when the customer had made no arrangements with Sears, when his material was purchased, for such work.

Floor covering installers are responsible for repairing—without further charge—any of their work which may prove defective; likewise, they are responsible for any damage they may do. Should they be notified regarding a customer's complaint with respect to their work, however, they may normally schedule the required repairs at their convenience.

(Sears' current contract form grants the firm the right to condition payment of the contractor's installation charge "upon inspection by and approval of Sears that the job has been satisfactorily and properly completed" consistently with the salesman's Estimate and Proposal form. So far as the record shows, however, Sears' right of inspection is seldom exercised. Whether a complaint requires inspection will be determined as a matter of business judgment. Defective work, normally, will be brought to the craftsman's attention through customer complaints, which may be made either through Sears, which relays them, or directly.)

Massey, so his testimony shows, tries to get any necessary repair work done within a couple of weeks; Joe and Eddie's Carpet Service try to get theirs done sooner. Should installers be called upon to perform repairs on someone else's work, or to replace defective materials, they charge their regular prices. For such supplementary work, however, prices are not pre-determined. Massey, so his testimony shows, charges prices which he, himself, fixes for repair or replacement jobs; he has never had a bill rejected under such circumstances.

Floor covering installers have the contractual right to reject any work which Sears has tendered; they have, upon numerous occasions, exercised that right following their first visit to the prospective customer's home. Such rejections may derive from various considerations; these may

compass the craftsman's belief that the job cannot be performed properly as described within the firm's Estimate and Proposal form, or his belief that he cannot make money on the job. Thus, for example: Joe Brase testified—with general corroboration—that he refused a particular job in May, 1968, because he did not feel that the way the customer and the Sears' salesmen wanted the job performed was the proper way. His testimony shows that he left the job, and that he returned only after the customer had called Sears and concurred with Brase's recommendation regarding the way the work should be done. Clark—so the record shows—has rejected Sears' work twice since August 14, 1968. Massey, likewise testified that he had rejected work several times. Stimac's testimony reveals a rejection, with respect to part of a proffered job, because he did not believe he could do a good job, consistently with Sears' specifications.

e. *How Installers Are Paid.*

When Sears has—within the recent past—undertaken to establish a working relationship with some particular floor covering installer, Complainant's warehouse installation department manager, or some appropriate person within Sears' Denver managerial hierarchy, has negotiated with that "contractor" regarding a so-called price list which details the prices to be charged and paid for installation work. General Counsel, within his brief, notes—correctly—that, within the present record, there was much divergent testimony concerning the precise way various prices *charged to Sears* by different installers originated. However, that testimony—within my view—need not be recapitulated in detail. By way of summary, I find merit in General Counsel's comment, within his brief, with respect thereto:

The critical thread which runs throughout the testi-

mony of those involved in the determination of the price lists is this—the greater portion of the prices currently in effect were proposed and initiated by the installers. Further, in those stituations where prices were initiated by Sears, the installers involved engaged in meaningful negotiation as to the prices.

For example, Paul Clark's testimony shows that he initiated his first contract with Sears, seeking installation work. Clark, when he discussed the possibility of procuring installation work with Chandler, Sears' warehouse installation department manager, proposed or "bid" certain prices for various types of work which were acceptable to the latter. The prospective contractor, likewise told Chandler that he felt his proposed prices would subsequently have to be revised upward; Chandler, so I find, concurred.

Massey and Harris, so the record shows, together presented a revised price list, sometime early during 1968; they sought Chandler's concurrence regarding a proposed increase in the various rates which they were being paid. Their testimony, regarding the precise form of the list which they presented, was contradictory. However, my record review has persuaded me that regardless of the form which their proposal may have taken, these hard surface floor covering craftsmen themselves initiated the suggestions which Chandler subsequently accepted, save for certain fixture moving charges.

Testimony which Division Manager McNally, Brase and Stimac proffered, likewise, supports such a determination, relative to their negotiations. I find that Brase and Stimac, too, were initiators with respect to prices.

With respect to certain recent 1967 negotiations between the Crown Carpet Company, and another carpet laying contracfor with whom Sears no longer deals, on the one hand, and Sears, Area Group Manager Donald Jansen, on the other, the record does show that Jansen, rather than

the designated installers, was responsible for broaching discussions looking toward a change to *lower* base "per square yard" prices. However, the craftsmen—so I find—presented a written counter-proposal, nevertheless, for further price modifications calculated to cover "special" contingencies, which, within their view, would more precisely and equitably reflect the complexity of some of the work which they were doing; with respect to these installer proposals, as well as Sears' lower base price proposal, consensus was finally reached.

The price lists drafted, pursuant to these negotiations, consistently set different rates of installers' compensation (Sears' cost) for various types of work—which may present varying degrees of difficulty and require varying degrees of skill.

> (The record, further, warrants a determination that—despite these negotiated prices—situations may still develop with respect to which new negotiations are required, because previously set price lists may not cover some specific contingency or because the installers may *refuse* to perform work, judged to be more complex and difficult, for previously negotiated prices.)

These price lists provide the basis for those installation charges which may be noted on Sear's Floor Covering Estimate and Proposal forms; store salesmen compute their customers' installation charges from price lists which, in turn, derive from the prices which installers charge the Complainant herein. When Sears' customer service representatives or warehouse installation department personnel can readily compute—from their salesman's Estimate and Proposal form—what the installation contractor's charge should or will be, that figure will be calculated, and proper notations will be made, wherever necessary, within the proper spaces on the contractor's job documents. Should

the designated Sears' representative be unable to determine a proper contractor's charge, these documents will be forwarded within Complainant's job folder with no stated charge shown.

(While the contractor's total charge has generally been entered on the work orders given the linoleum and tile layers, through Sears' warehouse, the space for such notations has frequently been left blank on those issued Joe and Eddie by Sear's Westland store.)

The record, however, clearly warrants a determination that the total contractor's price noted by Sears does not bind the floor covering installers concerned. These "contractors" are the final judges with respect to their own final charges. Those who testified, herein, declared—consistently—that they have changed Sears' total price notation whenever it did not, for any reason, correctly reflect the work performed. Division Manager McNally of Sears' Westland store conceded that Joe and Eddie have done this many times, with or without explanations.

When a job is completed and the particular craftsman concerned desires to be paid, he sends Complainant herein—wherever he originally picked up his work documents—the proper copy of Sears' Estimate and Proposal form previously received (No. 4 copy), together with a Sears originated invoice form.

(These documents may be turned in whenever the installer finishes his job; they may, however, be retained and accumulated before submission, for a week, or as long as the installer desires.)

If Sears' Proposal form (No. 2 copy) did not contain a notation stating the contractor's charge, he will make the necessary entry, based on his previously negotiated price list. Whenever he has performed extra work, directly related to whatever specific installations may have been

directed, he may *add* charges for such work to the total sum which Sears' representative may previously have entered; whenever the total charge computed by the Sears' representative has been misfigured, the contractor may note a *correction*. Such changes are, generally, made without Sears' authorization, though the contractor may have given Complainant notice of his intention to make a change, where large sums are concerned. In all three situations, Sears regularly changes its records, and pays the installer whatever sum he claims is owed, for the job or jobs covered. So far as the record shows, no bill ever submitted for a job or jobs, with respect to which the prices were first computed or recomputed by the contractor, has ever been rejected.

When paying floor covering installers, Sears withholds no sums to cover Social Security or Federal Income taxes; nor is there any percentage withheld to cover possible installation mistakes.

C. *Conclusions.*

1. The Installers are Independent Contractors.

The legal standard pursuant to which a determination must be made as to whether the floor covering installers, herein, must be considered independent contractors or employees involves the so-called "right to control" test. Cf. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93. The test has been declared relevant and proper, with judicial concurrence; it has been utilized many times. See, *e.g. Pure Seal Dairy Company*, 135 NLRB 76, 79. Within the case last cited, the Board formulated this legal standard as follows:

> In determining the status of persons alleged to be independent contractors, the Act requires the application of the "right to control" test. Where the person

> for whom the services are performed retains the right to control *the manner and means* by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to *the result sought*, the relationship is that of independent contractor. The resolution of this question depends upon the facts of each case and no one factor is determinative. (Emphasis supplied.)

When the facts of the present case are reviewed, with reference to this legal standard, their clear preponderance shows—within my view—that Sears does *not* retain the right to control *the manner and means* by which floor coverings which it sells will be installed. Rather, control is reserved *merely* with respect to the *result* sought. The floor covering craftsmen concerned herein, therefore, must be considered independent contractors. The Board's previously noted *Carpet Center* decision—which confirmed a Trial Examiner's determination, finding carpet installation workers to be employees of the respondent company therein designated—specified some six facets of the particular company-installer relationship, therein found, which the Trial Examiner and Board considered determinative. No more than one of these listed, however, can be considered characteristic of the company-installer relationship which this record reveals.

> (The Trial Examiner's *Carpet Center* decision refers to the fact that respondent company therein, should it find the work of particular installers displeasing in any respect, may discipline or get rid of them by withholding future assignments. Sears, with its installation contracts, likewise maintains such a right. I would consider the designated right consistent with either an "independent contractor" or "employee" determination.)

Within the Trial Examiner's decision noted, some ten further characteristics which mark *Carpet Center's* relation-

ship with its carpet installation workers are mentioned. Practically none of these, however, can be considered descriptive of Sears' relationship with the floor covering contractors which are herein concerned.

(First, the Trial Examiner's *Carpet Center* decision, among other things, notes that the manager of respondent company therein, when he assigns work to particular installers, takes into account both the number of yards to be laid, and where the installers live, trying to give them work near their homes. Sears' job tenders, directed to particular carpet layers, likewise, take into account the total number of yards to be laid. The present record, however, shows that those job assignment limitations which Sears will recognize derive from directives which the concerned installers have themselves laid down, rather than from Complainant's departmental policies. Further, Sears' job tenders are proffered without regard for the particular contractor's geographical convenience. Secondly, while Sears' contractors—like *Carpet Center's* workmen—are themselves required to load materials they may need for various jobs, this record warrants no determination that they are normally permitted or required to search for such materials, personally, within Sears' warehouse or departmental storage facilities. Thirdly, contractors are presumably requested or required—like *Carpet Center's* workmen—to give Sears notice, whenever they will be unavailable for work because of vacations, sickness, or for some other reasons; nothing in the present record, however, warrants a determination that Sears maintains a definitive rule or regulation, regarding the time limits before which such prior notice must be given. There is some record suggestion that such notices may, somtimes, not be given.)

Within his decision, the Board's *Carpet Center* Trial Examiner found—with respect to that firm's installation craftsmen—that "certain aspects of their relationship with the company," would, despite his contrary conclusion, tend to support a possible independent contractor determination. My reading of the decision noted reveals some five "aspects" characteristic of the relationship therein considered which might, arguably, have suggested such a conclusion. The present record, *inter alia*, reveals these selfsame five "aspects" likewise operative herein, coupled with others, when we consider the nature and scope of Sears' relationship with its various Denver floor covering installation contractors.

Such considerations, within my view, clearly require a determination—contrary to Respondent Union's suggestion herein—that *Carpet Center* presents a situation factually distinguishable from that which the present record reveals, regarding the nature of the relationship which Respondent Union herein, through its challenged course of conduct, presumably sought to modify.

This Board has previously declared that its resolution of so-called "independent contractor" questions, through what has been designated the "right to control" test, will depend upon the facts of each case, with no single factor considered determinative. The trier of fact, therefore, finds no necessity, herein, presently to recapitulate, *seriatim*, those several factors marking Sears' relationship with various floor covering installation contractors which dictate its final characterization as one falling within the statutory "doing business" concept. Rather, I find it sufficient to declare, broadly that, their relationship—*when considered in totality as detailed within the present record*—merits a characterization consistent with General Counsel's contention herein.

(Previously, within this decision, passing references

have been made to certain partially contradictory testimony proffered by General Counsel's witnesses, regarding the precise format of their suggested price list for linoleum and tile installation work, when they presented that list to Sears' warehouse installation department manager for negotiation. The first witness, Massey, testified that Chandler had been presented with proposals regarding the compensation which *Harris and he* wished to *receive* for various types of work related to linoleum and tile laying. Thereafter, Harris testified—differently—that Chandler was given proposals regarding the sums which Sears' *customers* should be *charged* for various tasks connected with linoleum and tile installation work; this proposal, so Harris declared, was drafted because of their presumption that Sears would, finally, determine *their compensation* by applying a predetermined percentage figure to whatever sums Complainant's customers may have been *charged* for installation services. While testifying, Harris produced a purported copy of the document which Chandler had been given; that document supports his recollection, since it shows proposed "selling" prices for installation work done in connection with Sears' linoleum and tile sales. With matters in this posture, Harris' testimony regarding the proposal's format—which Chandler substantially corroborated—merits credence. Having reached this conclusion, however, I reject Respondent Union's presumptively consequent contention that such a proposal, dealing with Sears' *selling* prices, suggests a consensus—shared by Chandler on the one hand, and both hard surface contractors on the other—that their price list negotiations were really *employer-employee* discussions. I note, in this connection, that the proposed price list—despite its form—was initiated by these

installers; both were seeking higher compensation. Further, I note that Chandler's final response—with respect to which both Massey and Harris later concurred—was prepared to show Sears' linoleum and tile work *costs;* rather than Sears' proposed *customer charges*, it listed the specific sums which *Massey and Harris* would, thereafter, *receive*. And in any event, whether or not my conclusion is considered sound, these Chandler-Massey-Harris negotiations, within my view, possess no compelling or crucial significance. When considered in perspective, *within the context which the complete record provides*, such negotiations can hardly be considered, themselves, sufficiently substantial or significant to warrant a rejection of General Counsel's position.)

Counsel for Respondent *Union did, finally, produce a* document culled from Sears' file wherein Complainant's various contractors were, substantially, directed to procure some designated insurance coverage, some sort of Federal Account number, and to have their contract notarized. Chandler's decision to promulgate these directives, however cannot—with due regard for the whole record—be considered sufficient to dictate a conclusion that he was addressing employees, or to vitiate my determination that Sears' floor covering installers held "independent contractor" status.

These installers, then, must be considered independent businessmen. And since Sears' concern, with respect to their work, is limited merely to such work's final result, Complainant's business relationship with them cannot be considered sufficiently close to destroy its neutrality. Complainant's counsel, within his brief, suggests—in this connection—that:—

> It is important in analyzing this record to understand that the installation of floor covering is not an inte-

> grated part of our business and in arranging for the installation Sears has not delegated the function normally performed, nor ever performed, by regular Sears employees; the customer is expressly told that Sears will not do the installation . . . In our situation the fact that Sears will find an installer for the customer is merely an aid in selling the merchandise; Sears has not replaced an integrated employee operation with an outside contractor.

These factual contentions, within my view, have record support; I concur. Further, nothing within the record would warrant a determination that Sears claims any power or right to determine labor relations policy for or with these floor covering installation contractors. Necessarily, therefore, Respondent Union's grievance could only be resolved by them, not by Complainant herein; I so find. Under no circumstances can these floor covering firms be considered "allies" with respect to Sears, concerning a dispute which the latter firm could resolve. Nor can the reverse be considered true. Respondent Union's contrary contention must be rejected.

2. Respondent Union's Conduct Violates the Statute.

Once a determination has been made that the various carpet, linoleum and tile layers whom Sears utilized for floor covering installation work must be considered independent contractors, there can be no doubt that Respondent Union herein—determined to procure a settlement of differences with Joe and Eddie's Carpet Service particularly—relied upon statutorily proscribed means to pursue objectives statutorily forbidden. I so find. Regarding this portion of General Counsel's case, Complainant's counsel, within his brief, notes:

> . . . that the Respondent attempted to make [Joe Brase, Eddie Stimac and Charles Duran] become members;

> that they refused to join; that upon their refusal to join they were picketed; that, when the picketing failed to have any effect, the Respondent began and continued to picket Sears. The object of the picketing at Sears can be and is only to force Sears to stop doing business with the installers until they join the Union.

This trier of fact finds counsel's statement both factually correct, and legally persuasive. The Supreme Court has clearly held that peaceful picketing—comparable with Respondent Union's picketing with which this case is concerned—constitutes "inducement" and "encouragement" statutorily proscribed. *N. L. R. B.* v. *Electrical Workers*, 341 U. S. 694, 701-702. Such a conclusion with respect to this case may be—indeed must be—considered warranted even though Respondent Union's picket lines, on some occasions, may not have been successful. *N. L. R. B.* v. *Denver Building Trades Council*, 193 F. 2d 421 (C. A. 10). Respondent Union's pickets have, however, had a discernible effect. True, the record may show nothing reliable or probative regarding their success, or lack of success, when they picketed Joe and Eddie's Carpet Service, specifically—nor may it show persuasively what success, if any, Respondent Union had when it picketed Sears' Cherry Creek store. With respect to Sears' warehouse, however, Respondent Union's picket line clearly brought results. Deliveries were delayed, or were not made. Such a record showing warrants a determination that Respondent Union's picket line was—despite the mild language found on its picket signs—reasonably calculated to induce or encourage individuals, employed by persons or business enterprises engaged in commerce, to refuse, in the course of their employment to transport, or otherwise handle or work on goods, articles, materials, or commodities, or to perform services. I so find. Further, Respondent Union's picket line—to the extent that it was successful—effectively threatened, coerced and restrained Sears directly.

Respondent Union's proscribed object, likewise, must be considered manifest. The Union's original purpose was shown when Joe and Eddie's Carpet Service was picketed, while the partners and their workman were performing work within a customer's home. When such picketing produced no tangible result, Respondent Union commenced its picketing of Complainant herein. As General Counsel notes—within his brief—the only conclusion which can properly be drawn when a labor organization pickets a commercial firm "doing business" with some independent contractor, with whom that labor organization has a dispute, must be the conclusion that at least "an" object of respondent labor organization's picket line is the forced cessation of that business relationship. I so find.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of Respondent Union and its designated representatives, set forth in Section III above—since they occurred in connection with the business operations of Complainant herein previously noted—have had a close, intimate, and substantial relation to trade, traffic, and commerce among the several States. Absent correction they would tend to lead, and in this instance have led, to labor disputes burdening and obstructing commerce, and the free flow of commerce.

V. The Remedy.

Since it has been found that Respondent Union and its representatives did engage, and continue to engage, in certain unfair labor practices, it will be recommended that they cease and desist therefrom, and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Conclusions of Law

In the light of these findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. Sears, Roebuck and Co. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Joe Brase and Eddie Stimac, d b a Joe and Eddie's Carpet Service Company; Crown Carpet, Inc.; Paul E. Clark, d b a Clark Carpet Service; Frank Harris, d b a Frank Harris Tile Company; Daryl Massey, d b a Duke's Floor Covering; Joseph Mozzicato; John Erpelding, d b a Sea-Ro Tile Company; and Gerald Fallert, d b a G. & H. Tile Company, are persons engaged in commerce, or in an industry affecting commerce, within the meaning of Section 2(6) and (7) of the Act, as amended.

3. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended.

4. By inducing and encouraging individuals employed by Sears, or by other persons engaged in commerce or in an industry affecting commerce, to refuse, in the course of their employment, to transport or otherwise handle or work on goods, materials, articles or other commodities, or to perform services—for the purpose of forcing or requiring Sears to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with, Joe and Eddie's Carpet Service, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, and G. & H. Tile Company—Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(i)(B) of the Act, as amended.

5. By threats, coercion or restraint, directed both to Sears, Roebuck and Co. and other persons engaged in commerce or in an industry affecting commerce—for the purpose of forcing or requiring such persons to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer processor, or manufacturer, and to cease doing business with other persons—the Respondent Union has committed an unfair labor practice within the meaning of Section 8(b)(4)(ii)(B) of the Act, as amended.

6 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

Recommended Order.

Upon these findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that respondent labor organization, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, together with its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducement or encouragement of any individual employed by Sears, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require Sears, Roebuck and Co., or any other person, to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato,

Sea-Roe Tile Company, G. & H. Tile Company, or any other person;

(b) Threatening, coercing or restraining Sears, Roebuck and Co., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Sears, or any other person, to cease doing business with the partnership and several sole proprietorships designated within the proceding subparagraph.

2. Take the following affirmative action which will effectuate the policies of the Act, as amended.

(a) Post in conspicuous places at its business offices and meeting halls, including all places where notices to members are customarily posted, copies of the notice attached to this report as an appendix.[1] Copies of this notice, to be furnished by the Regional Director for Region 27, as the Board's agent, shall be posted immediately upon their receipt, after being duly signed on behalf of respondent labor organization by its duly designated representative. Once posted, it shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by respondent labor organization to insure that this notice is not altered, defaced, or covered by any other material;

(b) Sign and mail sufficient copies of this said notice to the Regional Director for Region 27 for posting by Sears Roebuck and Co., this recipient being willing, at all locations where notices to employees and installation contractors are customarily posted;

1. In the event that this Recommended Order is adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

(c) File with the Regional Director of Region 27, as the Board's agent, within 20 days of the service of this decision, a written statement setting forth the manner and form in which it has complied with these recommendations.[2]

Dated: February 6, 1969.

s MAURICE M. MILLER,
Trial Examiner.

APPENDIX.

NOTICE.

To All Members of Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO.

PURSUANT TO

The Recommended Order of a Trial Examiner of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify you that:

WE WILL NOT induce or encourage anyone employed by Sears, Roebuck and Co., or by any other person engaged in commerce—or in an industry which affects commerce—to engage in a strike or refusal—in the course of his employment—to use, manufacture, process transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services—for the purpose of forcing or requiring Sears Roebuck and Co., or any other person,

2. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 27, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

to cease doing business with Joe and Eddie's Carpet Service Company, Clark Carpet Service, Frank Harris Tile Company, Duke's Floor Covering, Joseph Mozzicato, Sea-Ro Tile Company, G. & H. Tile Company, or any other person.

WE WILL NOT threaten, coerce or restrain Sears, Roebuck and Co., or any other person engaged in commerce—or in an industry which affects commerce—by maintaining picket lines, or by any other means—for the purpose of forcing or requiring Sears, Roebuck and Co., or any other person, to cease doing business with the partnerships and sole proprietorships named in the paragraph above.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 260 New Custom House, 721—19th Street, Denver, Colorado, 80202, Telephone No. 297-3551.

UNITED STATES COURT OF APPEALS,

Tenth Circuit.

March, 1969, Term

Filed United States Court of Appeals, Tenth Circuit, May 15, 1969. William L. Whittaker, Clerk.

SEARS, ROEBUCK AND CO., CHARGING PARTY AND COMPLAINANT BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Appellant,

vs.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Respondent-Appellee,

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee.

No. 6-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

Gerald C. Smetana, Chicago, Illinois (Donald L. Giacomini, Denver, Colorado, and Kalvin M. Grove, Chicago, Illinois, on the brief) for Appellant;

Philip Hornbein, Jr., Denver, Colorado, for Respondent-Appellee;

Julius G. Serot, Assistant General Counsel, Washington, D.C. (Arnold Ordman, General Counsel, Dominick L.

Manoli, Associate General Counsel, and Marvin Roth, Attorney, Washington, D. C., on the brief) for Petitioner-Appellee.

Before MURRAH, *Chief Judge*, and LEWIS and HILL, *United States Circuit Judges*.

HILL, *Circuit Judge*.

This is an appeal by Sears, Roebuck and Company, the charging party and complainant before the N. L. R. B., from an order of the district court dismissing the petition of the Regional Director for a preliminary injunction under section 10(l) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(l). The Regional Director did not appeal from the denial of the injunction and asserts that consequently this court does not have jurisdiction to consider the merits of the matter because Sears lacks the necessary standing to prosecute this appeal.

Sears originally filed a charge with the Board alleging that the Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, was picketing Sears in furtherance of a dispute with Joe and Eddie's Carpet Service, a firm employed to install floor coverings sold by Sears. After investigating the charge, the Regional Director concluded that there was reasonable cause to believe that the Union was engaged in picketing in violation of section 8(b)(4)(i)(ii)(B) of the Act, and that a Board complaint based on that charge should be issued. Pursuant to the mandate of § 10(l), the Regional Director then filed a petition for an injunction with the district court pending final disposition of the complaint before the Board. As the charging party, Sears was notified, in accordance with the provisions of § 10(l), of the filing of the petition and the time and place of the hearing to be held by the district court. At that hearing the party

litigants, the Board and the Union, presented evidence to support their contrary positions on the unlawful picketing issue underlying the Board's quest for an injunction. Sears put in an official appearance but did not participate in any meaningful fashion. The court considered the various contentions of the parties and concluded that the Board had failed to sustain a case for injunctive relief. The Regional Director decided to accept the judgment of the court but Sears disagreed and instituted this appeal.

The Board takes the position that Sears was not a party to the § 10(l) court proceeding and cannot appeal therefrom. This is said to follow from the fact that § 10(l) merely provides that the charging party "shall be given an opportunity to appear by counsel and present any relevant testimony." It is argued that to expand that grant of limited participation into a full scale right to appeal when the Board declines to do so, would be not only to ignore the plain meaning of the statutory language, but would constitute a total disregard for the overall scheme of labor injunction treatment embodied in the N. L. R. A. and the Norris-LaGuardia Act.

Sears counters by stressing that § 10(l) is an exception to the general prohibition against labor injunctions, which to be fully understood requires that a distinction be made between "institution" of an injunction proceeding and "subsequent acts in support thereof." Sears claims that Norris-LaGuardia is concerned only with the institution of such petitions and that once the Board has filed the petition pursuant to § 10(l),[1] Norris-LaGuardia no longer operates as a barrier. Thus § 10(l) should be interpreted as granting charging parties all the rights of full juridicial parties, including the right to appeal. We cannot agree and

[1] Section 10(h) exempts section 10 proceedings from the operation of Norris-LaGuardia. Hence, when the Board invokes § 10(l) the district court has jurisdiction.

must conclude that Sears lacks the necessary standing to undertake this appeal.

It is not necessary to repeat the history of abuses that prompted the Norris-LaGuardia Act, nor to belabor the public policy formulated therein. The language of that Act clearly indicated that "Congress was intent upon taking the federal courts out of the labor injunction business . . ." *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369 (1960). Accordingly, when an exception to that Act, such as is here involved, is relied upon to support the jurisdiction of the court, the language employed to articulate that exception will not be given any more expansive an interpretation than is clearly warranted.[2] Viewed in that context, the limited rights conferred upon a charging party in a § 10(l) proceeding, the right "to appear by counsel and present any relevant testimony," must be taken to mean just that, no more and no less. To read into that restricted right of participation, the right to initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem.

Section 10(l), and its counterpart § 10(j), were designed to provide temporary injunctive relief pending the final adjudication of the Board. The temporary relief is allowed only upon the filing of a petition by the Regional Director. It is his view of the facts and law that the district court is to consider. "The courts are not free to roam at will over every aspect of a labor dispute upon the request of the charging party. * * * [T]he principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to

2. The Supreme Court has repeatedly cautioned against judicial dilution of Norris-LaGuardia, *e.g.*, *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940).

aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." *McLeod* v. *Business Machine & Office Appl. Mech. Conf. Bd.*, 300 F. 2d 237, 243 (2d Cir. 1962). "When the Board declines to appeal an adverse district court decision, the charging party may not initiate an appeal, for then the charging party would become the principal complainant, in defiance of the scheme of the Act to the contrary."

The cases relied upon by Sears, namely, *Automobile Workers* v. *Scofield*, 382 U. S. 205 (1965) and *Retail Clerks Union* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965), are distinguishable and of limited assistance here. In Scofield the Court held that both the successful charging party and the successful charged party have a right to intervene in the court of appeals proceeding reviewing a final Board order. Section 10(f) of the Act expressly provides for the right of an aggrieved party to obtain judicial review. The Court determined that "Congress would not intend, without clearly expressing a view to the contrary, that a party should suffer by his own success before an agency." 382 U. S. at 216. No plausible theory has been advanced to justify extending the reasoning of Scofield to the totally unrelated issue presented here. Sections 10(l) and 10(f) deal with completely different situations. The temporary injunctive relief provided by § 10(l) does not contain elements of multiplicity of appeals or stare decisis that concerned the Court in its consideration of the § 10(f) question.

In Retail Clerks the court reviewed the action of a district court that had granted a temporary injunction after the Board had attempted to withdraw a § 10(l) petition. In upholding the right to grant an injunction after considering evidence introduced by the charging party, the court observed that to do otherwise "would make the district court's action a mere rubber stamp for the Regional Direc-

tor." 351 F. 2d at 530. The precise holding of the case thus relates to the conduct of § 10(l) petitions in the district court and can have no direct bearing upon the right to appeal at issue here. Moreover, any implifications to the contrary that might be drawn from the decision, are completely dispelled by the fact that the court denied the request of the charging party to intervene at the appellate level. If the court had intended to accord charging parties equal status with full party litigants, there would have been no need to intervene and certainly no justification for requiring the parties to appear as amici curiae.

In sum, we conclude that to grant a charging party the right to appeal, a right ordinarily reserved to party litigants, would constitute an unwarranted expansion of the more limited rights conferred by the express language of § 10(l). Such an expansion, if there is to be one, must originate from other sources.

Sears urges in the alternative; that if the contention that it is already a party in the § 10(l) proceedings is rejected, then permission should be granted to allow it to intervene in order to prosecute this appeal. What has been said with regard to the right to appeal as a party, applies with equal force to the assertion of a right to appeal as an intervenor. Section 10(l) confers specific limited rights upon a charging party. The right to initiate an appeal is not one of them. What cannot be obtained directly by asserting a right to appeal as a party, cannot be obtained indirectly through intervention. Cf. *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D. N. Y. 1966).

Appeal Dismissed.

176 NLRB No. 120

D-2074
Denver, Colo.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

SEARS, ROEBUCK AND CO.

Case 27-CC-278.

DECISION AND ORDER.

On February 6, 1969, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed an answering brief and cross-exceptions with a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the excep-

tions, cross-exceptions, and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following clarification.[1]

We agree with the Trial Examiner's findings, based on the application of the "right to control" test to the particular facts of this case, that the floor covering installers involved herein, who perform services for Sears, Roebuck and Co., are independent contractors. Further, we agree that there is no basis for finding Sears to be an "ally" of the contractors in their dispute with the Respondent.

As more fully set forth by the Trial Examiner, all of the installations are accomplished by separate enterprises, which have other customers in the Denver area. These businesses are operated from the homes of their owners, who perform no work on the Sears' premises. They operate with their own business trucks, tools, materials, bank accounts and liability insurance, and they wear no Sears' uniforms of any kind. The installers are responsible to repair any of their work which is defective and to pay for any damage. The installation enterprises set their own daily work limitations and schedules and, on occasion, several have subcontracted Sears' jobs without prior approval or knowledge of Sears. Although the contracts between Sears and the installers call upon the contractor to refrain from doing extra work for Sears' customers without written authorization, the practice is clearly to the contrary. Unlike Sears' employees, the installers' relationship with the company is not governed by the personnel manual, nor do they have to take the physical examination required of all Sears' employees, and none of the con-

1. The Respondent's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions, cross-exceptions and briefs, adequately presents the issues and the positions of the parties.

tractors or their employees receive any employee benefits from Sears, except an occasional 1-day discount which is also available to police and firemen, among others. Those installers who perform services with their own employees pay such assistants at rates fixed solely by them and deduct from their wages all necessary items such as social security and taxes. On the other hand, the contractors are paid by Sears without any such deductions.

Contrary to the Respondent's contention, the facts of this case are clearly distinguishable from those in *Carpet Center*.[2] Unlike the particular indicia of control retained by the retail carpet dealer in that case, the record here shows that the installers can and do schedule work for other customers on the days they work for Sears and they determine the order of performance. Furthermore, Joe and Eddie's Carpet Service, one of the installers herein, reschedules work by arrangement with Sears' customers without notifying Sears. None of the installers are supplied with precut or presewn material, or with instructions on how to get to a customer's premises. The contractors need not report to Sears daily or at any given time, and assignment of work is not based on where the installers live. Although the contractors are presumably required to give Sears notice whenever they will be unavailable for work because of vacations, sickness, or for some other reason, there is some record evidence that such notices are not given. The price lists which were arrived at through negotiations between Sears and the installers reflect the fact that the contractors are paid according to the difficulty of the work, instead of a single rate per square yard. The installers can and do change the prices set forth on work orders if for any reason they do not accurately reflect the

2. *Local No. 2265, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpet Center, Inc.)*, 170 NLRB No. 93.

actual work performed. Generally the installers are supplied with a room layout showing the areas to be covered and on occasion the seams to be sewn; however, they may and do disregard said layouts if they believe they can perform the job in a more satisfactory manner. Furthermore, if in their judgment a job cannot be completed satisfactorily the installers can and do reject the assignment.[3]

From the foregoing, it is apparent that the Sears' installers clearly have a far greater scope of decision-making power than those in *Carpet Center* and *Arnold's Carpet* and are independent contractors.

Having found that the installers are independent contractors and that Sears is not sufficiently related to the contractors to destroy its neutrality, we adopt the Trial Examiner's further findings that Respondent violated Section 8(b) (4) (i) (ii) (B) of the Act by picketing Sears, with an unlawful object of forcing Sears to cease doing business with the installers, including Joe and Eddie's Carpet Service, with whom the Respondent had a dispute.

3. The instant case is also distinguishable from the recent decision in *Carpet, Linoleum and Soft Tile Layers Local No. 1238 (Arnold's Carpet)*, 175 NLRB No. 50, in that here there is substantial record evidence that the installers can and do exercise independent judgment over the manner of cutting and piecing together the carpet. We also note that, whereas the installer in *Arnold's Carpet* received weekly payments, the Sears contractors may be paid by the job or whenever they desire.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 20, 1969.

FRANK W. McCULLOCH,
Chairman.

GERARD A. BROWN,
Member.

SAM ZAGORIA,
Member.

National Labor Relations Board.

(SEAL)

IN THE UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No. 23223.

PETITION TO REVIEW AND SET ASIDE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, hereby petitions the Court to review and set aside a Decision and Order of the National Labor Relations Board in the case designated *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO and Sears, Roebuck and Co.*, cited officially at 176 NLRB No. 120, and decided June 20, 1969.

Jurisdiction of this Court is invoked pursuant to Section 10(f) of the National Labor Relations Act as amended, Act of June 23, 1947 C. 120, 61 Stat. 136, 29 U. S. C. § 151, et seq.

Said Decision and Order of the Board was that Petitioner had committed certain unfair labor practices within the meaning of the said Act and therefore Petitioner is a "person aggrieved by a final order of the Board" within the

meaning of Section 10(f) of the National Labor Relations Act.

Respectfully submitted,

DAVID S. BARR,
WILLIAM S. PEER.

Of Counsel:
BARR & PEER,
1825 K Street, N. W.,
Washington, D. C. 20006.

PHILIP HORNBEIN, JR., Esq.,
2007 Security Life Building,
Denver, Colorado 80202.
Counsel for Petitioner.

[Certificate of service omitted in printing.]

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Petitioner*, vs. NATIONAL LABOR RELATIONS BOARD, *Respondent*	Case No. 23,223

MOTION OF SEARS, ROEBUCK AND CO. FOR LEAVE TO INTERVENE

Now comes Sears, Roebuck and Co., a New York corporation, and pursuant to Rule 15(d), Federal Rules of Appellate Procedure, requests leave to intervene in the above proceedings and in support thereof states as follows:

1. Sears, Roebuck and Co. was the charging party before the National Labor Relations Board in the case designated *Carpet, Linoleum and Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO and Sears, Roebuck and Co.*, 170 NLRB No. 115, and the instant case seeks review of the order of the National Labor Relations Board granting relief to the conduct of Petitioner complained of by Sears, Roebuck and Co.

2. The picketing of Petitioner which occurred prior to the issuance of the order by the National Labor Relations Board occurred at the premises of installations of Sears, Roebuck and Co. in Denver, Colorado.

3. Sears, Roebuck and Co. has a vital interest in the outcome of the instant case and its rights will be seriously affected by an adverse decision. *[illegible] Power Reactor Company*, 367 U.S. 396 (1961).

Wherefore, Sears, Roebuck and Co. prays that this Honorable Court grant it leave to intervene in this proceedings and argue for enforcement of the order of the National Labor Relations Board.

Respectfully submitted,

KALVIN M. GROVE,
Kalvin M. Grove

EDELSTEIN, RAUNHEIM AND FOX,
111 West Washington,
Chicago, Illinois 60602

July 11, 1969.

(Certificate of service omitted in printing.)

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Petitioner*, vs. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	No. 23,223.

CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

On July 3, 1969 pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151, et seq.), Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, instituted the captioned proceeding by filing with this Court a petition to review and set aside an order issued against it by the National Labor Relations Board on June 20, 1969, in a case appearing on the records of the Board as Case No. 27-CC-278.

Pursuant to Section 10(f) of the Act and Section 15(b) of the Federal Rules of Appellate Procedure, the Board files this cross-application for enforcement of said order.

In support of this cross-application, the Board respectfully shows:

(1) This Court has jurisdiction of this cross-application for enforcement by virtue of Section 10(f) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 20, 1960, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Petitioner, its officers, agents and representatives. On the same date, the Board's Decision and Order was served upon the Petitioner by sending a copy thereof post paid, bearing Government frank, by registered mail, to the Petitioner.

(3) Pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Rule 15 of the Federal Rules of Appellate Procedure, the Board is certifying and filing with this Court a list of the documents, pleadings, and materials comprising the entire record of the proceeding before the Board as well as the findings and order of the Board in Case No. 27-CA-2[illegible].

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this transcript, application and transcript to be served upon the Petitioner, and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and exhibits, and the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring the Petitioner, its officers, agents, and representatives to comply therewith.

Marcel Mallet-Prevost,
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 15th day of August, 1960

[Certificate of service omitted in printing.]

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

September Term, 1968.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION No. 419, AFL-CIO, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	No. 23,223

Before: Tamm and Robb, Circuit Judges, in Chambers.

ORDER.

Filed August 25, 1969. Nathan J. Paulson, *Clerk*.

On consideration of the motion of Sears, Roebuck and Co. for leave to intervene, it is

ORDERED by the Court that the aforesaid motion be granted and said movant is allowed to intervene in this case.

Per Curiam.

ORDER OF THE SUPREME COURT OF THE UNITED STATES.

"The motion of the American Retail Federation for leave to file a brief, as amicus curiae, is granted. The motion of the Terminal Freight Handling Company, et. al., for leave to file a brief, as amici curiae, is also granted. The petition for a writ of certiorari is granted and the case is placed on the summary calendar."

[Order Issued November 17, 1969.]

STATUTE INVOLVED

National Labor Relations Act

61 Stat. 136, 29 U. S. C. § 151, et seq.

Sec. 8(b)(4)(B); (29 U. S. C. § 158(b)(4)(B))

"It shall be an unfair labor practice for a labor organization or its agents

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of

such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

SEC. 10. (a) [As in Act] [29 U.S.C. § 160(a)].

(b) [As in Act] [29 U.S.C. § 160(b)].

(c) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which petitions may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. Upon the filing of the petition the court shall cause notice thereof to be served upon such person, and thereupon the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evi

dence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of

the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation

the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such or

ganizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).".

SUPREME COURT, U. S.

FILED

FEB 10 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, Regional Director of the Twenty-seventh Region of the NATIONAL LABOR RELATIONS BOARD, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO

DAVID S. BARR
1825 K Street, N. W.
Washington, D. C. 20006

PHILIP HORNBEIN, JR.
2007 Security Life Bldg.
Denver, Colo. 80202

Attorneys for the Union Respondent

Of Counsel:

BARR & PEER
1825 K Street, N. W.
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

1. Proceedings on the Merits of the Underlying Dispute.

On the Regional Director's complaint, and after a hearing, a Trial Examiner of the NLRB issued a decision on February 6, 1969, finding that the Union had violated Section 8(b)(4)(i)(ii)(B) of the Act and recommending, *inter alia*, that the Board order the respondent-union to cease and desist from the activities complained of (App., p. 80). The union had urged that its picketing was "primary" since Sears was not a neutral in the dispute. But the Trial Examiner concluded that Sears does not control "the manner and means" by which the floor covering which it sells will be installed. "Rather, control is reserved *merely* with respect to the *result* sought." He therefore found that the "floor covering craftsmen" must be considered "independent contractors", and Sears a neutral in the union's dispute with the installers. He distinguished the Board's prior decision in *Carpet Center, Inc.*, 170 NLRB No. 93, where the Board found "carpet installation workers to be employees of the respondent company therein designated." (App., p. 111). The Union had further urged that since the picket signs merely complained that "floor covering sold by Sears, Roebuck & Co. is installed by underpaid workers" and asked the public to "patronize firms employing union carpet & linoleum layers", its picketing did not have the object proscribed by Section 8(b)(4)(B) (App., p. 92). However, the Trial Examiner, relying on the fact that on one prior occasion the Union had picketed one of the installers, rejected the contention (App., pp. 116-118).

On June 20, 1969, the Board issued its Decision and Order agreeing with the findings, and adopting the recommended order, of the Trial Examiner (App., p. 130). The Board, as did the Trial Examiner, dis-

tinguished its prior decision in *Carpet Center, Inc.*, 170 NLRB No. 93, on the facts. The Board also distinguished its more recent decision in *Arnold's Carpet*, 175 NLRB No. 50, where in circumstances strikingly similar to the instant case its holding was to the contrary. (App., pp. 132-133).

The Union petitioned the United States Court of Appeals for the District of Columbia Circuit, under Section 10(f) of the Act, to review and set aside the Decision and Order of the Board (App., p. 135). The Board cross-applied for enforcement of its Order. (App., p. 139).[2] Briefs have been filed and the case was argued on January 22, 1970.

2. The Section 10(l) Proceedings.

Meanwhile, in the ancillary Section 10(l) proceeding, the District Court for the District of Colorado conducted an evidentiary hearing on the Regional Director's petition for temporary injunction.[3] In an

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[2] Sears' motion to intervene was granted (App., pp. 137, 141).

[3] When the question of Sears' status arose, the following colloquy ensued:

"The Court: Wait a minute, now. Don't they have to intervene?

Mr. Giacomini [counsel for Sears]: We do not seek to intervene. Pursuant to the act, the charging party is entitled to be present in court and represented by counsel to present any testimony.

The Court: Do you have any objection?

Mr. Hornbein [counsel for the Union]: It's my understanding they have a right to appear for the limited purpose of introducing evidence and presenting testimony and for that purpose only, and we have no objection to that.

The Court: Very well." (App., p. 13).

Thus Sears was permitted to participate on that limited basis, and thereafter made no move to intervene or cause its status to be redefined.

opinion filed October 4, 1968, the Court made the following fact findings with regard to the relationship between Sears and its installers:

> "Sears does . . . contract the whole job; that is, the carpeting or floor covering, plus the services. And, carries the responsibility of seeing to it that the job is satisfactory, because it is a Sears customer . . . each of [the installers] was eligible, on a one day discount pass, whereby they could buy [Sears] merchandise for ten percent off. . . . Sears has a vital interest in the price [of the whole job] . . . because they want to compete in the community. Perhaps more than that, they wish to be able to keep their prices below those of other concerns. . . . this is evident from the fact and the testimony that they have recently found that their margin of profit was nil because the service was eating it all up. So, they insisted on having a $1.35 rate per yard. . . . [T]he overall price had been $1.65. . . . Sears then negotiated this lower rate. . . . Also Sears is responsible for collecting. . . . these contractors have nothing whatsoever to do with collecting from the purchaser. Sears does this through its machinery; its credit plan or system. And, if there is a loss as a result of a bad debt or bankruptcy, why, Sears bears the risk of the loss." (App., pp. 24-25).

The Court also responded directly to a contention of the Regional Director, later to be repeated before the Board, that a contract between Sears and the installers showed the latter to be independent contractors. The Court said: ". . . the relationship arises as a result of the printed contract between Sears and the installer . . . It's prepared by Sears." (App., p. 25). "I think that it is somewhat a legalistic relationship; an arrangement. And, that a real effort has been made to see to it that it looks like an independent contractor relationship." (App., p. 27).

In applying the law to the facts, the Court stated that "Section 8(b)(4)(B) . . . is designed to protect innocent third parties . . . from economic loss as a result of a labor dispute in which they have no concern." (App., p. 25). The Court quoted from an opinion of the Court of Appeals for the District of Columbia Circuit (where the case on the merits is now pending): "Arrangements of the type here disclosed must be scrutinized by the Board with great care because of the danger that they may be used by the real parties in interest as a device to achieve insulation from union activity." (App., p. 26, quoting from *Local 24, Teamsters* v. *NLRB*, 266 F.2d 675, 680 (1959)). The Court also relied on the *Carpet Center* case, *supra*, where the "Board itself in a case that is quite similar to this reached the same conclusion that I reach." (App., p. 27).

Based on the foregoing, the Court denied the request for injunction and dismissed the case, concluding that Sears was not a neutral in the labor dispute and that there was "little probability" that the Board would sustain the complaint on the merits. (App., pp. 27-29). The Regional Director did not appeal. Sears filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit. (App., pp. 30-31). The Union filed a Motion to Dismiss or, in the alternative, To Affirm (App., p. 36), urging *inter alia* Sears' lack of standing to independently pursue injunctive relief by initiating an appeal under Section 10(l). The Regional Director similarly moved to dismiss on that ground (App., p. 42).

On May 15, 1969, the Court dismissed the appeal. (App., p. 124). Its decision noted the restrictive language in Section 10(l) regarding the role of a charg-

ing party, the history of abuses that prompted the enactment of the Norris-LaGuardia Act and the fact that Congress had that history very much in mind when it debated and enacted Section 10(l), and the decisions of this Court cautioning against judicial dilution of the policies expressed in Norris-LaGuardia. The Court concluded that judicial expansion of the limited right conferred upon a charging party in Section 10(l) "would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem." (App., p. 127).

Sears then petitioned this Court for a Writ of Certiorari, and its petition was granted on November 17, 1969 (App., p. 142).

SUMMARY OF ARGUMENT

I

1. This case is moot. The issue presented for decision is whether a charging party has standing to initiate an appeal from the denial by a district court of a Section 10(l) injunction. A resolution of that issue, however, would be "devoid of practical effect" (*A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 328 (1961)). For a Section 10(l) injunction, by the terms of the Section, cannot extend beyond "the final adjudication of the Board with respect to" the underlying dispute; and the "final adjudication" of the Board was in fact rendered on June 20, 1969 (App., p. 130). Hence no 10(l) injunction may issue at this time. If the Court affirms the decision below, its ruling merely requires something to be done which has already taken place—namely, dismissal of the Petitioner's appeal in the court below for lack of standing.

If the Court reverses, it in effect orders that the Petitioner be permitted to pursue a remedy which, at this stage of the litigation, the lower courts are powerless to provide. Since a ruling on the merits "cannot affect the result as to the thing in issue" (*California* v. *San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893)), the case should be dismissed as moot.

2. The Petitioner's reliance on *Southern Pacific Terminal* v. *I.C.C.*, 219 U.S. 498 (1911) is misplaced. The question there was whether the expiration of a two-year order of the I.C.C., requiring the terminal company to cease and desist from giving an undue preference to a certain shipper, rendered the case moot before it reached this Court. The Court rejected the mootness argument on the grounds that "the order of the Commission may to some extent . . . be the basis of further proceedings," and that the consideration of the underlying question "ought not to be . . . defeated, by short-term orders, capable of repetition, yet evading review. . . ." (219 U.S. at 515-516). In other words, a decision on the merits was necessary because the I.C.C. order, although technically expired, would otherwise continue to influence the economic activities of the parties. Their certain knowledge that the I.C.C. would be empowered to continue its attack on their mutually advantageous arrangement by successive two-year orders not subject to review would undoubtedly inhibit their freedom of action. No such consideration, however, is present in the instant case. What the Petitioner complains of is not an order aimed at regulating its activities, but a decision of the court below denying its standing to aim an injunctive shaft at the activities of its adversary. If this Court decides that the case is moot because it cannot affect

the result, no threatened order or legal process remains to influence or regulate the Petitioner's future conduct. For these reasons, the exception to the mootness rule embodied in the *Southern Pacific Terminal* case does not apply.

3. The Petitioner further contends that the case is not moot because the Board's June 20, 1969 Order lost its "finality" when the Union sought its review in the Court of Appeals. This is a tortured construction of the plain meaning of the words "final adjudication of the Board." It is also negated by the statutory scheme. For example, no reason appears why Congress would have specifically authorized reviewing Courts of Appeals to grant to the Board temporary injunctive relief under Sections 10(e) and (f) if indeed it had been intended that 10(l) injunctions could extend through the period of the appeal. In addition, Section 10(f) permits a "person aggrieved" to seek review of "a final order of the Board." If the reference to "final order" in that Section were to be construed as Petitioner would have us construe the almost identical language of Section 10(l), the absurd result would be to virtually eliminate Section 10(f) appeals; for each such appeal would defeat the "finality" of the Board's Order and, hence, defeat the appeal itself.

II

In any event, the decision of the court below should be affirmed. For Congress made it abundantly clear, by the statutory language and legislative history, that the courts were not to condone attempts by charging parties in Section 10(l) proceedings to seize the initiative from the Board and themselves control the litigation.

1. The language of Section 10(l) limits the role of a charging party by stating that he "shall be given an opportunity to appear by counsel and present any relevant testimony." As the Section makes clear, the Regional Director of the Board is entrusted with the responsibility of petitioning for injunctions in appropriate cases, and himself controlling the litigation. The charging party "may not substitute itself as the principal complainant." *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962). Congress demonstrated that when it intended to confer "party" status it knew how to say so. For instance in Section 10(l) itself the charged labor organization is referred to as "a party to the suit." And there are similar references in Sections 10(c) and (e). Thus to permit the Petitioner to initiate an appeal from the denial of a Section 10(l) injunction would be to twist the clear language of the statute beyond its intended meaning.

2. The legislative history shows that Congress was careful not to dent its Norris-LaGuardia policy beyond allowing *the Board* to pursue the injunctive remedy in certain enumerated cases. Private litigants were not to have access to that process. The House Bill (H.R. 3020) would have permitted private litigants to petition for injunctions in secondary boycott cases (1 Leg. Hist. 77-80). The Senate Bill (S. 1126) contained the present version of Section 10(l), permitting only the Board to obtain injunctive relief (1 Leg. Hist. 131). The House measure was eliminated in conference (2 Leg. Hist. 1540, 1544; 1 Leg. Hist. 561).

On the Senate side the supporters of S. 1126 expressed "justifiable fear" that "if we permit employers to resort to court procedure on their own . . .

we may end with no legislation at all." (Remarks of Senator Ellender, 2 Leg. Hist. 1057-1058). Senator Taft, the principal sponsor of the Bill, found that "opposition to restoring the injunctive process [to employers] even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong" that, in order to save the rest of the measure, he was forced to oppose an amendment offered by Senator Ball which would have permitted private litigants to obtain injunctive relief (2 Leg. Hist. 1365). The amendment was defeated by a vote of 62 to 28. (2 Leg. Hist. 1369-1370).

Manifestly, the notion that a charging party should have standing to appeal the denial of an injunction, where the Regional Director declines to do so, is entirely foreign to the intent of Congress in the enactment of Section 10(l).

3. This Court has recognized that the import of the legislative history was to vest in the Board sole control over Section 10(l) litigation. *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 204-205 (1962). In *Wagshal*, for example, the Court observed that the Labor Management Relations Act altered the law under the Norris-LaGuardia Act "only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party." (333 U.S. at 442). In obedience to that principle, lower courts have denied to charging parties in Section 10(l) proceedings the right to intervene (See, *e.g.*, *Henderson* v. *Local 701, Operating Engineers*, —— F. 2d ——, 73 LRRM 2111, 2114, fn. 2 (9th Cir. 1969)), or the right to pursue injunctive relief by staking out positions different from or independent of those taken by the Regional Director. *NLRB*

v. *Retail Clerks Union*, 243 F. 2d 777, 782-783 (9th Cir. 1956); *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962).

4. This Court's decision in *Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965) is inapposite. The Court there held that successful charged and charging parties should be allowed to intervene in Court of Appeals review cases arising under Sections 10(e) and (f) of the Act. Such cases, of course, involve none of the Norris-LaGuardia considerations that shaped the enactment of Section 10(l). *Scofield* was based on this Court's view that to deny intervention in that context would probably result in additional, duplicative, appeals, with attendant "circuit shopping," and an unnecessary delay of the time when disaffected parties could seek review of the merits in this Court. However, denial of the right of a private litigant to appeal in a Section 10(l) case would have none of these effects.

5. The Petitioner also relies heavily on *Retail Clerks* v. *Food Employers Council*, 351 F. 2d 525 (9th Cir. 1965) in support of its contention that by seeking to appeal it is merely "supporting" the Regional Director's petition for injunction. But that case stands for a different proposition. There the Regional Director petitioned the district court for a Section 10(l) injunction, but subsequently asked the court—over the charging party's objection—to approve a stipulation between himself and the charged union. The court instead issued the injunction; and the Court of Appeals affirmed on the ground that the district court is not "a mere rubber stamp for the Regional Director." Thus the holding of the case is not that *the charging party* may adopt a course independent of that taken by the Re-

gional Director, but that *the district court* may do so in the exercise of its discretion as to the "form of relief to be granted." (351 F. 2d at 530).

6. Other contentions raised by the Petitioner are addressed, briefly, under heading II, sub-heading E, of the Argument.

ARGUMENT

I. THE CASE IS MOOT.

1. The issue presented for decision—whether the charging party before the Board has standing to independently appeal the denial of a Section 10(l) injunction by the district court—is no longer viable. Section 10(l) permits the issuance of an injunction "pending the final adjudication of the Board with respect to such matter." The Board's final adjudication, concluding that the Union-Respondent had violated Section 8(b)(4)(B) of the Act and ordering the Union to cease its unlawful conduct, was rendered on June 20, 1969.[4] At that point, the ultimate relief sought by the Petitioner here, namely the issuance of a Section 10(l) injunction, could no longer be granted; indeed if such an injunction were then in effect it would have expired. Accordingly, the decision of the court below and the "standing" issue presented here are "presently devoid of practical effect," and there is no "case" or "controversy" before this Court. *Carpenters' District Council* v. *Boire*, 288 F. 2d 454, 455 (5th Cir. 1961); *Monique, Inc.* v. *Boire*, 344 F. 2d 1017, 1018 (5th Cir. 1965); *Reynolds* v. *Nashville Bldg. Trades Council*,

[4] Appendix, p. 130.

[5] *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 328 (1961).

383 F. 2d 562, 564 (6th Cir. 1967); *Sowell v. International Association of Machinists, District Lodge No. 1*, ——— F. 2d ———, 72 LRRM 2980 (3d Cir. 1969).

The governing principle was stated in *Chicago, San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893):

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, *or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.*" (Emphasis added).

The instant case is precisely within the rule, for the effect of a decision on the merits would be to declare a principle "which cannot affect the result as to the thing in issue." If the Court affirms, it necessarily requires something to be done which has already taken place—namely, dismissal of the Petitioner's appeal in the court below for lack of standing. If the Court reverses, it orders that the Petitioner be permitted to

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See also *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 (1964); *Association of New York City v. New York Marine & General Insurance Co.*, 376 U.S. 775 (1964); *Hicks v. Weaver*, 302 U.S. 449, 452 (1938); *International Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 386 (1951); *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963).

pursue a remedy which, at this stage of the litigation, the lower courts are powerless to provide. "One would be as vain as the other."[7] In these circumstances, to express an opinion on the merits "would be to ignore [a] basic limitation upon the duty and function of the Court, and to disregard principles of judicial administration long established and repeatedly followed."[8]

2. The Petitioner seeks support from an exception to the rule, characterized by such cases as *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911), *Division 1287 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* v. *State of Missouri*, 374 U.S. 74 (1963), and *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968).[9] *Southern Pacific Terminal* was initiated by a bill in equity to enjoin an order of the I.C.C. requiring the terminal company to cease and desist (for a two-year period) from giving undue preference to a certain shipper. By the time the case reached this Court, the two-year cease and desist order had expired, and the I.C.C. suggested mootness. This Court rejected the argument on the theory that "the order of the Commission may to some extent . . . be the basis of further proceedings;" and that the consideration of the underlying question "ought not to be '. . . defeated, by short-term orders, capable of repetition, yet evading review . . . .'" (219 U.S. at

[7] *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923).

[8] *Local No. 86, etc.* v. *Missouri*, *supra*, fn. 6, at 367-368.

[9] Reply to Memorandum in Opposition to Petition for Writ of Certiorari, pp. 8-10 (hereafter referred to as "Reply to Memorandum").

515-516).[10] In *Amalgamated* v. *Missouri, supra,* the Union engaged in a strike against a public transit company. The same day, the Governor of the state seized the company, and thereafter secured an injunction against the strike under a State law which prohibited any strike against the utility or the State after possession has been taken by the State. The Supreme Court of Missouri affirmed the issuance of the injunction. When the case came before the Court, mootness was urged on the ground that in the interim the Governor had terminated the seizure order. The Court rejected the contention. It noted that "the labor dispute remains unresolved" and "[t]here thus exists in the present case not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the [seizure law]." (at 78).[11] Finally, in *Carroll* v.

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[10] The holding was further explicated in *Southern Pacific Co.* v. *I.C.C.*, 219 U.S. 433, 452 (1911), decided the same day. There the agency had issued a similar two-year order nullifying a rate that had been set by the railroad for certain shipments, and fixing instead a lower rate. The order expired before the question reached this Court. On the mootness point, the Court held: "The contention is disposed of by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* . . . . In addition to the considerations expressed in that case, it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." (at 452).

[11] On that basis, the Court distinguished *Local No. 8-6, etc.* v. *Missouri, supra,* fn. 6, involving similar facts and the same seizure law, but where the underlying dispute had been settled and new collective bargaining agreements entered into prior to this Court's review of the case. As we shall show, this case is governed by *Local No. 8-6, etc.* v. *Missouri,* not *Amalgamated* v. *Missouri.*

Princess Anne, *supra*, the issue was whether the expiration of a ten-day restraining order, enjoining the National States Rights Party from holding rallies or meetings "which will tend to disturb and endanger the citizens of the County," caused the question of the legality of said order to be mooted before this Court. The Court responded in the negative. It noted that the activities of the petitioners were continuing, that public officials continued to restrict said activities on the strength of the decision below, and thus "the decision of the Maryland Court of Appeals [affirming the ten-day order] continues to play a substantial role in the response of officials to their activities." (393 U.S. at 178).

What these cases have in common is that, in each, the order or conduct complained of—if not reviewed because of mootness—would continue to have a coercive, injunctive influence on the conduct of the complainant. In each case, the order complained of had been thrust at the complainant as a sword and remained suspended in that position after its technical expiration. It could only be removed by decision of this Court. Thus, in *Southern Pacific Terminal*, the terminal company and its "preferred" shipper would be precluded from resuming an arrangement they found mutually profitable by the certain knowledge that the I.C.C. could continue to attack the arrangement by succeeding two-year orders not subject to review. And the same kind of economic coercion would characterize the post-order period in *Southern Pacific Co.* v. *I.C.C.* In *Amalgamated* v. *Missouri* the Union's strike activities would obviously be inhibited, and its bargaining position vis-a-vis the company would be weakened, by the continuing threat of repeated State seizure and concomitant injunction. And in the case of *Carroll* v. *Princess Anne*, the petitioners' exercise of First

Amendment rights could be repeatedly thwarted by the actions of public officials, backed by the state courts, in reliance on an unreviewable decision of that State's highest court. In short, this exception to the mootness rule was necessary to permit the complainants to carry on their underlying activities without the encumbrance of what were, in practical effect, continuing injunctions.

By way of contrast, the Petitioner in the instant case does not seek review of an injunctive order, or repeated threat thereof, aimed at its activities. Rather than pointing a sword at the complainant, the decision of the Court below merely prevented the Petitioner from itself brandishing an injunctive sword *against another*. If this Court decides that the case is moot, no order or legal process, or injunctive threat, would remain to influence or govern the Petitioner's future conduct.[12]

Moreover it is highly unlikely that the Petitioner would ever again be faced with all the circumstances whose confluence created the issue here—namely, picketing directed against the Petitioner which the Board's Regional Director believes violative of the Act, denial by a district court of the Regional Director's petition for a Section 10(l) injunction, and decision by the Regional Director not to appeal. "[S]uch speculative contingencies afford no basis" for a decision on the merits where, as here, the case has other-

[12] The Petitioner's complaint about "the jeopardy in which [it] now finds itself as a consequence of the absence of . . . injunctive relief . . . ." (Reply to Memorandum, p. 4) is wholly without foundation. By its own admission, the picketing ceased in June, 1969. If injunctive relief were now needed, it could be obtained by the Board in the Court of Appeals in which the appeal on the merits is pending, pursuant to Section 10(e) or (f) of the Act.

wise "lost its character as a present, live controversy." *Hall* v. *Beals*, 396 U.S. 45, 46 (1969); see also, *Brockington* v. *Rhodes*, 396 U.S. 41 (1969).

Therefore, the rule of mootness, rather than its exception, is applicable here.

3. The Petitioner's additional contention that "final adjudication of the Board" really means "final adjudication of the Board" *and reviewing courts*[13] is without merit because it ignores the plain meaning of words. And a review of the statutory scheme undermines the contention entirely. The statute contemplates that, at the outset, *pendente lite* relief may be obtained pursuant to Section 10(l), and if further such relief is required thereafter it may be obtained from the reviewing Court of Appeals. Thus under Section 10(e), when the Board petitions a Court of Appeals for enforcement of its order it may obtain in that court "appropriate temporary relief or restraining order." Similarly, under Section 10(f), when review of the Board's order is sought by "any person aggrieved" thereby, the Court of Appeals may "grant to the Board such temporary relief or restraining order as it deems just and proper." In this manner *pendente lite* relief is preserved throughout the litigation by specific references in the statute. It would have made no sense for Congress to provide for such relief in Sections 10(e) and (f) if the 10(l) injunction were intended to continue in effect until the entire litigation had run its course. Moreover, pursuant to Section 10(f) a "person aggrieved" may seek review only of "a final order of the Board." The latter phrase can have no different

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[13] Reply to Memorandum, pp. 4-8.

meaning than "the final adjudication of the Board," pending which injunction may be secured under Section 10(l). Thus if, as the Petitioner asserts, an appeal extinguishes the "finality" of a Board order, every appeal under Section 10(f) would *ipso facto* eliminate its foundation and, therefore, itself—a patently absurd result.

The Petitioner's construction of the statute is also contradicted by the legislative history. Senator Taft, the principal sponsor of the measure that ultimately became law, described the contemplated operation of Section 10(l): "... The Board can go to court and get a temporary injunction against further operation of the strike *while the National Labor Relations Board is hearing the question* as to whether it is an illegal strike or not, *and deciding whether it will issue a permanent injunction* [sic] against that particular strike." (emphasis added) (2 Legislative History of the Labor Management Relations Act of 1947, p. 1013). Taft's explanation is consistent only with a conclusion that a Section 10(l) injunction was not to extend beyond the Board's order.

That view is also confirmed by a number of cases. Thus, in *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 241 (2d Cir. 1962), the Court said: "Section 10(l) was designed by Congress to provide a means by which temporary injunctive relief could be obtained 'pending the final adjudication of the Board.' Sen. Rep. No. 105 (80th Cong. 1947), p. 27, H.R. Conf. Rep. No. 510 (80th Cong. 1947), p. 57. It does not provide relief beyond that stage .... It is clear, therefore, that if the Board holds the present case does not involve an unfair labor practice, the injunction affirmed here must

be dissolved forthwith, regardless of whether the charging party decides to appeal." See also, *Reynolds* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir. 1967); *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (5th Cir. 1965); *Carpenters' District Council* v. *Boire*, 288 F. 2d 454 (5th Cir. 1961).

Apparently to the contrary is *Houston Insulation Contractors Ass'n.* v. *NLRB*, 339 F. 2d 868 (5th Cir. 1964). There the charging party-appellant sought review of the Board's dismissal of a Section 8(b)(4) complaint. Appellant asked for a stay of the Board's order, or a restraining order against the Union, pending appeal. The Board did not challenge the Court's authority to issue the stay (see Section 10(g)), but contested the power of the Court to issue a restraining order at the behest of the charging party. The Court of Appeals noted that a 10(l) injunction had issued on the Board's petition at the outset of the litigation. While recognizing that "ordinarily a § 10(l) injunction expires upon final adjudication by the Board . . ." (at 870), the Court—finding it unnecessary to decide the charging party's standing to seek injunctive relief—ordered a stay and stated that its effect would be to extend the 10(l) injunction. Since the statute requires that the 10(l) injunction expire on the issuance of the Board's order, as we have shown, the holding is incorrect insofar as it purported to extend the injunction as a consequence of the stay. The Court should have squarely faced the "standing" issue. We believe that the case is distinguishable on the ground that the Court viewed the extension of the 10(l) injunction as an incident to its conceded power to stay the Board's order. If the case is not distinguishable on that ground, it is in conflict with the later holding of the same

Court that a Section 10(l) injunction would "necessarily terminate" upon the decision of the Board. *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (5th Cir. 1965).

II. IT IS CLEAR FROM THE STATUTORY LANGUAGE, THE LEGISLATIVE HISTORY, AND DECISIONS OF THIS COURT THAT CONGRESS DID NOT INTEND TO VEST PRIVATE PERSONS WITH STANDING TO APPEAL A DENIAL OF AN INJUNCTION UNDER SECTION 10(1) OF THE ACT.

It has long been axiomatic that only a "party" has standing to appeal. *Payne* v. *Niles*, 20 How. 219, 221, 15 L. Ed. 895, 896 (1858); *United States ex rel State of Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917). Congress made it abundantly clear, by the statutory language and legislative history of the Labor Management Relations Act of 1947, that charging parties before the Board were not to have "party" status in Section 10(l) proceedings.

A. The Statutory Language.

We begin with the language of Section 10(l). It states that upon the filing of a petition by the Board "the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity *to appear by counsel and present any relevant testimony* . . ." (emphasis supplied). Not surprisingly, the Courts have held that Congress meant precisely what it said. As stated in *Phillips* v. *United Mine Workers of America*, 218 F. Supp. 103, 105-106 (D.C. Tenn. 1963), "[t]he Court cannot read into the statutory language of Section 10(l), when it permits a charging party to appear by counsel and present relevant testimony, the right of a charging party to do anything more than just that." The Second Circuit,

in *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962), said:

> "We are mindful of the fact that the statute allows the charging party to appear by counsel and present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant."

Hence, the affirmative words used by Congress in describing the role of the charging party were meant to be "negative of other objects than those affirmed." *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 174. For had Congress intended charging parties to have a greater role, by way of intervention, party status, or appeal rights, it could have said so. For example, in the very Section under review Congress specified that the labor organization sought to be enjoined shall be "a party to the suit." Section 10(c) speaks of the participants in unfair labor practice cases before the Board's trial examiners as "parties to the proceeding." And Section 10(e), involving review of Board orders in the Courts of Appeals, states that "either party" may apply to the court for leave to adduce additional evidence.

The statutory scheme is such that only the Board may seek temporary injunctive relief in the District Courts (under Sections 10(j) and (l)) or, on review, in the Courts of Appeals (pursuant to Sections 10(e) and (f)). Indeed even under Section 10(f), where the appeal on the merits is taken not by the Board but by the "person aggrieved by a final order of the Board," the Court's jurisdiction is "to grant *to the*

Board [not to the appellant] such temporary relief or restraining order as it deems just and proper." (emphasis added). Thus both the language and structure of the statute argue against according to private litigants a greater role than is indicated by the express words of Section 10(l).

B. The Legislative History.

The legislative history of the Act conclusively demonstrates the specific intent of Congress to deny to private litigants independent access to the injunctive process, lest the time-honored policy enunciated in the Norris-LaGuardia Act (29 U.S.C.A. § 101, et seq.) be subverted.[14] We now turn to an examination of that history.

The major conflict, right from the start, was whether the injunctive process in Section 8(b)(4) situations was to be controlled by private litigants or the Board. The House Bill (H.R. 3020) embraced the former solution, while the Senate Bill (S. 1126) adopted the latter. See S. 1126, as reported (1 Leg. Hist. 131); H.R. 3020, as reported (1 Leg. Hist. 77-80); Senate Report No. 105 on S. 1126 (1 Leg. Hist. 409).[15] Proponents of the House version were ultimately forced to yield in the face of overwhelming opposition to the intrusion of private litigants in the injunctive process, and the certainty that a Presidential veto would have to be overcome.[16] There was also significant opposi-

[14] Relevant provisions of the Norris-LaGuardia Act are set forth in the Appendix to this Brief.

[15] The references are to the 2-volume Legislative History of the Labor Management Relations Act, 1947.

[16] After conferees adopted the Senate version, the veto materialized but was overridden. 1 Leg. Hist. 915-921; 1 Leg. Hist. 921-923.

tion to permitting the issuance of any injunctions whatever.[17]

The Senate debates in the month of April, 1947 described the atmosphere. Senator Ellender, a supporter of S. 1126 and reluctant supporter of the Senate version of Section 10(l), explained:

> ". . . I presented a proposal to correct the existing evil, and, after long discussion as to how best to handle the subject I followed the views of the Senator from Oregon and the Senator from New York respecting the method of dealing with the situation, which is through the Board, instead of by direct action on the part of the employer . . . I fear that if we permit employers *to resort to court procedure on their own* we may again drift into the type of abuses which brought about the passage of the Norris-LaGuardia Act . . . My fear—and I think it is a justifiable fear—is that *if we should go too far we may end with no legislation at all.*" 2 Leg. Hist. 1057-1058.

Senator Smith, a supporter of S. 1126, responded to the concern expressed in the minority report that the bill "slices a wedge out of the Norris-LaGuardia Act:"[18]

> "The only comment I can make on that statement is that we were very careful in this bill to protect

[17] See, *e.g.*, Senate Minority Report No. 105, PT 2, on S. 1126, which complained that Section 10(l) "slices a wedge out of the Norris-LaGuardia Act by making application for labor injunctions mandatory in certain types of labor disputes." 1 Leg. Hist. 167, and the remarks of Senator Murray to the same effect at 2 Leg. Hist. 1036.

[18] The emphasis shown in italics here, and elsewhere in the quotation of legislative history, is our own.

[19] *Supra*, fn. 17.

the right to control the litigation . . ." 2 Leg. Hist. 1354.

Senator Ives spoke in opposition to the Ball amendment: "... his proposal revives the injunction *upon the request of an employer* . . . there is definitely a violation of the principle of the Norris-LaGuardia Act . . . . I deplore a condition which *in any way, shape, or manner* will revive the flagrant abuses which brought about the enactment of the Norris-LaGuardia. I think the pending amendment opens the door; it is the entering wedge." 2 Leg. Hist. 1356. Senator Smith also spoke in opposition: "It is my judgment that the Norris-LaGuardia Act should be open only for injunctions *in behalf of the Government*, in the limited classes of cases provided in our bill . . . we would be making a very serious mistake to open the Norris-LaGuardia Act beyond that point . . ." 2 Leg. Hist. 1364. Donnell asked Smith why an injured party should not be permitted to go to court and "control his own litigation." 2 Leg. Hist. 1364. Smith replied: "... I admit that secondary boycotts and jurisdictional strikes are indefensible; but questions will arise with respect to which discretion may be needed, and I believe that the Board can serve a very useful function . . ." 2 Leg. Hist. 1365.[20]

[20] For example, in any given case under Section 10(l), the Regional Director may calculate that by the time an appeal from the denial of an injunction is concluded, the Board will have decided the case on its merits and that therefore an appeal would be useless; or the Regional Director may determine that the decision of the district court defying an injunction was so carefully reasoned and persuasive on its face as to make reversal highly improbable and that therefore the expenditure of public time and money on an appeal would be unwarranted. Charging parties are not apt to be attentive to such considerations in their haste to engage the processes of the Courts of Appeals in their own protection.

During the course of this debate, there was pending a substitute measure offered by Senator Taft which would permit employers to seek *damages* in the courts by virtue of violations of Section 8(b)(4).[21] Taft, the principal sponsor of S. 1126, rose to withdraw his substitute, promising to offer it at a later time, with this comment:

> "I found that *opposition to restoring the injunctive process, even in cases of secondary boycotts and jurisdictional strikes, seemed to be so strong,* and I am so anxious to retain provisions covering the right of direct action in suits brought for damages in cases of that kind, that I have determined that I shall vote against the Ball amendment and then offer the substitute . . ." 2 Leg. Hist. 1365.

The Ball amendment was defeated by a vote of 62 to 28. 2 Leg. Hist. 1369-1370.

When Taft re-offered his Section 303 amendment, he was careful to assure the Senate that his amendment was not intended to permit injunctions in contravention of Norris-LaGuardia. 2 Leg. Hist. 1370-1371, 1381, 1396. Said Taft: "That is the reason I yielded my position, because the feeling, the sentiment against suspending the Norris-LaGuardia Act was so strong." 2 Leg. Hist. 1381.[22]

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[21] The measure was ultimately enacted as Section 303 of the Act (see Appendix to this brief).

[22] There was one final, limited, effort to make the injunction remedy available to private parties. Senator Aiken offered an amendment which would have allowed private persons to obtain injunctions in the District Courts where a violation of Section 8(b)(4) threatened destruction or spoilage of "perishable agricultural commodities." It too was defeated. 2 Leg. Hist. 1375, 1389-1390.

On June 5, 1947, after exhaustive debate and a conference between the House and Senate to resolve their differences, Taft reported that the House version of Sestion 10(l) had been eliminated. 2 Leg. Hist. 1540: "... [I]n such cases the injunction can be obtained only through the National Labor Relations Board. In that respect the House accepted entirely the provisions of the Senate bill." 2 Leg. Hist. 1544. The House Conference Report No. 510 on H.R. 3020 stated: "... the House bill, in Section 12, provided for injunctions at the request of private persons, rather than by the Board, in cases like these. The conference agreement adopts the procedure of the Senate amendment." 1 Leg. Hist. 561. The fight was over.

From the foregoing, particularly the debates regarding the Ball amendment, it is manifest that in relation to injunctive relief the conflict in the Congress was over who should be entitled "to control the litigation," to "approach" the courts, to "request" relief.[23] Proposals which would have placed such rights in the hands of private litigants were firmly rejected. It cannot be doubted that to allow the Petitioner to appeal the denial of an injunction under Section 10(l), where the Board does not appeal, is to permit it "to control the litigation," "approach" the courts for an injunction, "request" injunctive relief or, as Peti-

[23] Petitioner would have us believe that the sole issue involved "the right to initiate injunction suits;" that once the Board petitioned for injunctive relief, the initiative in the injunctive process was up for grabs; that as part of a "compromise" the Section was drafted expressly to confer on charging parties full party status. (Pet. Brief 29). The short answer is that these assertions find no support in the legislative history. The only "compromise" revealed was that in exchange for obtaining any injunctive relief at all, limited at that to a certain class of cases, proponents of the bill had to give up entirely the notion that private parties would be entitled to such relief on an independent basis.

tioner would have it, "initiate" injunctive action. In light of the "fear" expressed by the legislators that they might "end with no legislation at all" (2 Leg. Hist. 1057-1058) because of the "strong" opposition to "restoring the injunctive process" to private hands (2 Leg. Hist. 1365), Congress plainly rejected the Petitioner's right to control 10(l) litigation. This understanding of the legislative mood in 1947 is of paramount importance, for it compels the construction of Section 10(l) which was adopted by the Court below.

C. Decisions of the Courts.

In 1948, a year after the enactment of the Taft-Hartley Act and with the legislative history fresh in its mind, this Court said: "The short answer to the argument that the Labor-Management Relations Act of 1947, 61 Stat. 136, 149, § 10(h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed *only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.*" (emphasis added). *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948).

That the import of the legislative history was to vest in the Board sole control over Section 10(l) litigation was again recognized by this Court in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). There, in a suit brought under Section 301 of the Labor-Management Relations Act,[21] Sinclair sought an injunction

[21] Section 301 vests in the district courts jurisdiction over suits "for violation of contracts between an employer and a labor organizations."

against alleged work stoppages in violation of compulsory arbitration and no-strike provisions of its collective bargaining agreement with the union. The issue, as the majority saw it, was whether Section 301 impliedly repealed Section 4 of the Norris-LaGuardia Act. In responding to the issue in the negative, and holding that the activity complained of could not be enjoined, the majority opinion observed that if Congress had intended Section 301 to effect a partial repeal of the Norris-LaGuardia Act, it would have said so expressly. "That is indeed precisely what Congress did do in §§ 10 (h) and 208 (b) of the Taft-Hartley Act, *by permitting injunctions to be obtained, not by private litigants, but only at the instance of the National Labor Relations Board* and the Attorney General, and in § 302 (e), by permitting private litigants to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities." (at 204-205) (emphasis supplied). The dissenters did not disagree with this point. They argued that assuming Congress did not intend to repeal § 4 of the Norris-LaGuardia Act by enacting Section 301 of the Labor Management Relations Act, it was still necessary for the Courts to accommodate the conflict between the anti-injunctive policy of the former and the policy of the latter favoring enforcement of agreements to arbitrate disputes. That this was the basis of the dissent was made plain in *Teamsters v. Village Transit*, 370 U.S. 711 (1962), where the issue was the same. The Court reversed a decision of the lower court granting an injunction, on the basis of *Sinclair*. The dissenters in *Sinclair* concurred in *Village Transit* on the ground that "the collective bargaining agreement involved in this case does not bind either party to arbitrate any dispute." (at

Of course, the instant case does not present the "accommodation" issue that troubled the dissenters in *Sinclair*. We may therefore assume that the *Sinclair* Court was united in the view that Section 10(l) permitted "injunctions to be obtained . . . only at the instance of the National Labor Relations Board." (370 U. S. at 204-205).

In obedience to that principle, lower courts have denied to charging parties in Section 10(l) proceedings the right to pursue injunctive relief by urging positions different from or independent of those taken by the Regional Director (*McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242, 243 (2d Cir. 1962); *NLRB* v. *Retail Store Employees Union*, 243 F. 2d 777, 782-783 (9th Cir. 1956)), as well as the right to intervene. *Regalbuto* v. *Marlene Industries Corp.*, 253 F. Supp. 722 (D.C.N.Y. 1966); *Phillips* v. *United Mine Workers of America*, 218 F. Supp. 184 (D.C. Tenn. 1963); *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, —— F. 2d ——, 69 LRRM 2865 (9th Cir. 1968), *cert. den.* 393 U.S. 926 (1968); *Hernandez* v. *Local 701, Operating Engineers*, —— F. 2d ——, 73 L.R.R.M. 2111 (9th Cir. 1969).[2]

[2] The International Federation, as *amicus*, cites *McLeod* v. *General Electric Co.* and *NLRB* v. *Nashville Building and Construction Trades Council* (ARF Brief, p. 8, fn. 15) in support of its contention that "the Second and Sixth Circuits have, conversely, unconditionally permitted such intervention." In *McLeod*, the name of the charging party appears as "intervenor" in the caption, but the Court's opinion does not address the point and there is no indication that intervention was contested. In the Sixth Circuit case, there was before it a Section 10(e) petition for enforcement filed by the Board on the merits of the controversy, a Section 10(j) request and a writ of mandamus filed by the Union. The employer was allowed to intervene in the [illegible] on the strength of this Court's decision in *Nashville*, cited heading D.

D. Petitioner's Reliance on Scofield and Food Employers Council Is Misplaced.

1. Petitioner places primary reliance on *Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), wherein this Court held that successful charged parties and charging parties should be allowed to intervene in Court of Appeals review cases. But *Scofield* is inapposite.

A Section 10(k) proceeding "is independent of that on the merits,"[26] and the two types of proceedings involve "significantly different considerations and legislative purposes."[27] Review cases under Sections 10(e) and (f) involve none of the Norris-LaGuardia considerations that shaped the enactment of Section 10(k). For that reason two differing lines of authority have developed over the years. In review cases, headed by *Scofield*, the "public versus private interests" shibboleth has been attenuated and the scope of participation on the part of private litigants has been considerably broadened. In injunction cases, on the other hand, the firm line of authority[28] has denied to private litigants the right to initiate, control, or shape the proceedings.

Moreover, *Scofield* was based on this Court's view that to deny intervention to successful charged and charging parties in the first review on the merits would probably result in additional, duplicative appeals, with attendant "circuit shopping," and a delay of the time when disaffected parties could seek review in this Court. Of course, the denial of the right of private

[26] *Labor Board* v. *Denver Building Council*, 341 U.S. 675, 682 (1951).

[27] *Local 1976, Carpenters* v. *NLRB*, 357 U.S. 93, 110 (1958).

[28] See cases cited under subheading C, *supra*.

litigants to appeal in Section 10(l) cases would have no such effects." Therefore, the court below was correct in distinguishing *Scofield* on these grounds, as were the courts in *Reynolds* v. *Marlene Industries*, 250 F. Supp. 722, 723 (D.C.N.Y. 1966), and *Henderson* v. *Local 701, Operating Engineers*, —— F. 2d ——, 73 LRRM 2111, 2114, fn. 2 (9th Cir. 1969), and Moore in 3B Moore's Federal Practice, Para. 24.06, p. "24-131" (2d ed. 1969).

2. In support of the proposition that its appeal should be allowed because it seeks merely to "support" the Regional Director's petition for injunction, the Petitioner relies heavily on *Retail Clerks* v. *Food Employers Council*, 351 F. 2d 525 (9th Cir. 1965) (Pet. Brief, p. 33). There, having found cause to believe that Section 8(e) had been violated, the Regional Director filed a petition in District Court for a 10(l) injunction. Subsequently, however, the court approved a stipulation between the Regional Director and the Union whereby the latter agreed not to implement the contractual clause under attack, pending the Board's determination on the merits. The petition for injunction was dismissed. Later still, the Union took action which the Regional Director believed to be in conflict with the stipulation. Accordingly, he filed a new 10(l) petition in the District Court. Again the Union and

[2] In distinguishing *Amalgamated Utility Workers* v. *Consolidated Edison Company*, 309 U.S. 261 (1940), the Court in *Scofield* said: "We find nothing inconsistent in denying the right of a private party to institute a contempt proceeding where the Board's expertness in achieving compliance with orders is challenged, and on the other hand, in permitting intervention *in a proceeding already in the court* (emphasis added). In the instant case, Petitioner seeks to institute the appellate proceeding, not merely to participate "in a proceeding already in the court."

Regional Director sought court approval of a stipulation, and the charging parties opposed the stipulation. The court entered a temporary injunction and, on appeal by the Regional Director and the Union, the Ninth Circuit affirmed. The Court of Appeals rejected the argument that under Section 10(l) the district court was precluded from issuing an injunction in the face of the Regional Director's request that its petition be dismissed. It noted, correctly, that the district court is not "a mere rubber stamp for the Regional Director," and that the statute "places in the district court the discretion as to the form of relief to be granted." (at 530, 531). Thus the holding of the case is not that *the charging party* may adopt a course independent of that taken by the Regional Director, but that *the district court* may do so in the exercise of its discretion as to the form of relief to be granted—a proposition not at all inconsistent with the position taken by Respondents in the instant case. Moreover, in distinguishing *McLeod* v. *Business Machine & Office Appliance Mechanics Conference Board*, and *NLRB* v. *Retail Clerks* (supra, sub heading C), the Court of Appeals observed that, unlike the conduct of the charging parties in those two cases, the charging parties here "did not petition the court independently, or for relief different than that sought by the Regional Director . . ." (at 529). But, in the instant case, the Petitioner is seeking the right to petition the Court of Appeals "independently," and in appealing in the face of the Regional Director's decision not to do so — "for relief different than that sought by the Regional Director."

In a footnoted dictum (fn. 28) the court goes on to say that even if it could be stated that the charging parties had procured the injunction on their own, it

would not necessarily constitute reversible error since the strict dichotomy between public and private rights has been "justly criticized." The dictum is wrong; it overlooks the vital distinction between review and injunction cases (*supra*); and it is in conflict with that court's own decisions in *NLRB v. Retail Clerks Union*, 243 F. 2d 775, 782-783 (9th Cir. 1956); *San Francisco-Oakland Newspaper Guild v. Kennedy*, — F. 2d —, 69 LRRM 2855 (9th Cir. 1968), cert. den. 393 U.S. 926 (1968); and *Henderson v. Local 501, Operating Engineers*, — F. 2d —, 73 LRRM 2111, 2114, fn. 2 (9th Cir. 1969).

In fact, in denying intervention to the charging party in *Henderson*, the Ninth Circuit distinguished *Food Employers* and ignored its dictum, and followed the decision of the Tenth Circuit in this case which also distinguished *Food Employers*.

E. Other Contentions Raised by Petitioner

1. The Petitioner seeks to import into Section 10(l) its right to independently appeal from the denial of an injunction, by analogy to the right of review given to other persons, in other contexts, under other statutes (Pet. Brief, pp. 21, 46-47). The short answer is that whether one speaks of appeal rights or intervention rights (Pet. Brief, p. 47), "federal agencies are not fungibles . . . and Congress has treated the matter with attention to the particular statutory scheme and agency. . . . [N]or should a determination under one statute be mechanically carried over in the interpretation of another statute involving significantly different

[illegible] 380 U.S. 205, 210 (1965). See also, 3B Moore's Federal Practice, para. 24.06, pp. "24-111" and "24-115" (2d ed. 1969).

considerations and legislative purposes." *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 110 (1958).

2. Petitioner relies on Moore's statement (Pet. Br. p. 16) that "[w]here a statute gives an absolute right to be heard, which is tantamount to formal intervention, there is a concomitant right of appeal, except where the statute itself precludes an appeal. 4 Moore, Federal Practice 104 (2d ed. 1963)." But Moore could not have been speaking in support of the Petitioner's position here. For in another paragraph of the same volume he said: "Where the prevention of multiple appeals is not at stake, the rule [to appeal] should not apply. Thus when the NLRB seeks to restrain unfair labor practices and obtains a decree granting injunctive relief against the unfair labor practices pending Board proceedings, the charging party has no right to intervene."

3. The Petitioner's "due process" argument (Pet. Br. p. 13) fails because the Constitution does not require that litigants be afforded a right or opportunity to appeal. *McKane v. Durston*, 153 U.S. 684, 687 (1894). Moreover, Petitioner's citation of such cases as *Griffin v. Illinois*, 351 U.S. 12 (1956) (Pet. Br. p. 13) does not aid

5. The Petitioner's further contention (Pet. Br., p. 16, fn. 1) that to deprive it of the right to appeal in Section 10(l) cases is to deprive it of any meaningful "remedy" is patently specious. It overlooks the fact that the charging party has the right to have its claim litigated on the merits before the Board and the Courts and, as we have seen, to participate fully in those proceedings; that it has the additional right to sue the offending union for damages under Section 303 of the Act (see Appendix to this Brief); that 10(l) proceedings are designed merely to afford temporary *pendente lite* protection in aid of the Board's process and are ancillary to the proceedings on the merits; that Section 10(l) relief may be obtained at the behest of the Board; and if further such relief is necessary during the course of appeals it may be obtained by the Board under Section 10(e) and (f) of the Act. Thus charging parties are amply protected.

In fact, the Board's control of injunction actions works to the advantage, not detriment, of charging-party employers. For it enables them to obtain the protection of injunctions secured by the Board without being encumbered by the bond or security requirements imposed on private litigants in other causes pursuant to Rules 62(c) and 65(c) of the Federal Rules of Civil Procedure, or by defenses normally available to opposing parties in courts of equity. See, *e.g., Henderson v. Local 701, Operating Engineers*, — F.2d —, 73 LRRM 2111, 2115 (9th Cir. 1969), in which it was held that the "unclean hands" defense was not available against the Board in a Section 10(l) proceeding.

6. The Petitioner argues that since "Congress created a substantive right on behalf of charging parties to an injunction of secondary boycotts," it must have

intended to afford them relief from a denial of that right when the Board declines to appeal. (Pet. Br., pp. 16-17). The premise of the argument is wrong. As we have shown, Congress created no such "substantive right." If it had, the Petitioner's argument would logically lead it to conclude that it could petition the district court for the injunction in the first place. And that even the Petitioner concedes it may not do.

CONCLUSION

For the reasons stated, the Court is urged to dismiss the case as moot or, in the alternative, to affirm the decision of the court below.

Respectfully submitted,

DAVID S. BARR
1825 K Street, N. W.
Washington, D. C. 20006

PHILIP HORNBEIN, JR.
2007 Security Life Bldg.
Denver, Colo. 80202

Attorneys for the Union-Respondent

APPENDIX

Statutes Involved

National Labor Relations Act
(61 Stat. S.136, 29 U.S.C. Section 151, et seq.)

Sec. 303 (29 U.S.C. Section 187):

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Norris LaGuardia Act
(47 Stat. 70, 29 U.S.C. Sections 101, 102, 104 and 107):

§ 101. Issuance of restraining orders and injunctions; limitations; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§ 101. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or per-

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complainant made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no temporary restraining order shall be issued on account of any threat or unlawful act except against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

That substantial and irreparable injury to complainant's property will follow;

That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of such relief;

That complainant has no adequate remedy at law; and

That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property. *Provided, however*, that if a complainant shall also allege that, unless a temporary restraining order shall be issued with all notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs, together with a reasonable attorney's fee, and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing had after notice and upon motion of which hearing complainant and surety

shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

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NO. 470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK & CO.,
Petitioner,
v.
CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING FITTERS, LOCAL UNION No. 419, AFL-CIO
and
FRANCES SUBLETTE, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
The Brawner Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 476

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

correct, and the legal theory on which he proceeds may be untested and erroneous. Under § 10(l) even in situations in which eventual success on the merits is marginal the Board must proceed. The General Counsel's discretion is exhausted when he decides to issue a complaint since the Act requires that in every instance in which a § 8(b)(4) complaint is issued an injunction must be sought. Thus initiating a § 10(l) suit is a mere ministerial act.

This being so it strains credulity to say that a major battle was fought in Congress solely over who was to have the right to start the injunctive proceeding. On the other hand, the course of the legislative debate makes perfect sense if the dispute was over whether the Board was also to have the exclusive power to make discretionary litigation judgments as to the theory to be pursued, the scope of relief to be sought, the motions to be made, and the proper point at which to terminate the proceeding. For the heart of the problem prior to 1932 had been the systematic distortion of the judicial function at the behest of business interests with a personal stake in the outcome, and the consequent identification of the courts with those interests, *see* Frankfurter & Greene at 47, 137. This was the history that was fresh in the minds of the Senators who accepted § 10(l) but refused to support the Ball Amendment. It is the history that compels approval of the decision reached by the court below.

3. In its heyday the labor injunction grew like Topsy. In large measure it did so because employers intent on injunctive relief were quick to press for every possible advantage without regard to the effect of their tactics on the overall logic of the law. It was precisely for this reason that Norris-LaGuardia was cast in such absolute terms, *see, e.g.*, 75 Cong. Rec. 4776 (1932) (Remarks of Sen. Long) ("We can sit up at night and write all we want into this bill, but we are still going to have plenty of difficulty keep-

ing the necessity of lawyers who are seeking injunctions from finding a door wide enough to keep through [illegible], and that the Ball Amendment was rejected. The position espoused by Sears in this litigation proves the wisdom of this absolute prohibition of the private labor injunction.

Sears' basic theory (Br. 11) is that Congress intended all those who have the right to "appear by counsel and present any relevant testimony" to be parties in 10(l) cases. The short, but complete, answer is that the draftsmen of the Taft-Hartley Amendments used the word "party" when they intended to grant that status, *see, e.g.*, the third proviso to 10(l). A fuller answer is that Sears' view does not meet the contention that the enactment of 10(l) and the rejection of the Ball Amendment were motivated by a desire to avoid a repetition of the abuses which had flourished prior to 1932. *See* pp. 4-8, *supra*. Finally, it is all but impossible to understand how the statement "in general charging parties enjoy the status of 'parties' in proceedings under Section 10(l), possessing all the rights and privileges . . . such as the right to seek appellate review attendant to that status." (Br. 14) can be squared with the admission that charging parties are "unable to alter the theories, facts, or nature of relief sought by the Board" (Br. 30). Certainly, those rights are normally attendant on party status, and the fact that they were not granted demonstrates that employers are not parties to 10(l) suits in any conventional sense. Indeed Sears admission does more. It recognizes that Congress was not concerned solely with vesting the Board with exclusive power to initiate 10(l) proceedings, and that it was also concerned with assuring that employers were restricted to a subordinate role throughout the course of such litigation. *See, Business Machine & Office Appliance Mechanics*, 201 F.2d at 242. Plainly, the right to appeal when the Board decides it is inadvisable to do so is inconsistent with that role. It is simply semantic legerde-

main to say that an independent appeal is an act in aid of the Board. And of course it is Congress's expressed desire to have the employer play a subordinate role in §10(l) cases which distinguishes the question presented here from the question of a charging party's right to intervene in a review proceeding which was decided in *International Union, UAW* v. *Scofield*, 382 U.S. 205 (1965).

Underlying Sears' basic argument is the view (Br. 16-17) that employers must have the right to appeal from a denial of a §10(l) injunction in order to have an effective remedy for alleged violations of §8(b)(4). However, the fact is that the arsenal of remedies of one who complains of secondary activity is the most complete in federal labor law.

First, while Sears neglects to mention the provision, the Act contains §303 which provides for private damage actions. No employer unfair labor practice gives rise to a private cause of action in federal courts.

Second, §10(l) provides for mandatory injunctions. There is no provision for mandatory injunctions against employer unfair labor practices. The result is that despite the fact that four times as many complaints are issued against employers as against unions; seven times as many injunctions are issued against unions as against employers. Thirty-third Annual Report of the National Labor Relations Board, Tables 8 and 20.

Third, the fact that the Board enforces §10(l) provides substantial benefits to employers. It means that even though Sears has the long pocket here the government carries the main burden of litigation which forces the union to defend itself in two forums, the District Court and the Board. And of course the Board is not encumbered, nor do unions have the benefit of, the bond and security requirements of Rules 62(c) and 65(c) of the Federal Rules of Civil Procedure, or of defenses such as "unclean hands,"

Henderson v. *Local 701, Operating Engineers*, — F.2d. —, 73 LRRM 2111, 2115 (C.A. 9th Cir., 1969).

Finally, in light of the unhappy history of the over-utilization of the labor injunction, the recognition that the issuance of a temporary injunction "may effectively dispose of the [union's] rights" *Curry*, 371 U.S. at 550, the absence of financial recourse for a union that has been wrongly enjoined, the existence of the employers' 303 damage remedy, the certainty that the mandatory direction to the Board to proceed in all 8(b)(4) complaint cases will produce suits lacking in equity, and the language of 10(l) which states that the court shall grant "such . . . relief . . . as it deems just and proper", it was to be expected that the courts would act only on a showing that the probability of ultimate success on the merits is clear. This has not happened. In general, the lower courts have not been sensitive to this Court's admonition that:

> "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. . . . The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

Instead of weighing the necessity of an injunction, the courts have been content to ascertain whether there is reasonable cause to believe that the Board's allegations are true, *see, e.g., Warehousemen Union* v. *Hoffman*, 302 F.2d 352 (C.A. 9th Cir., 1962). Acting under this erroneous standard they have consistently granted 90% of the Board's petitions to

enjoin allegedly secondary conduct, Thirty-Third Annual NLRB Report, Table 20.

Thus the remedies available as of now are strong and pervasive. Indeed, it is fair to say that the situation today bears an unfortunate resemblance to that which prevailed in 1931. Yet Sears attempts to build on this already formidable structure. It seeks to keep the basic benefits of Board enforcement, without any of the limitations that flow from the subordinate status of private parties in §10(l) proceedings, and to turn ancillary remedy *pendente lite* into the centerpiece of the remedial scheme for violations of §8 (b)(4).

As we have noted, in pursuing this goal Sears has not been loath to stretch the Act or its legislative history out of shape. Nor, as we now show, has it been content to develop its position within the restraints imposed by the Constitution. For it argues (Br. 37-43) that due process requires the conclusion that employers have the right to appeal denials of §10(l) injunctions. But due process does not grant the right of appeal. While "it is now fundamental that once established [avenues of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . . This Court has never held that the States [or the federal government] are required to establish avenues of appellate review . . ." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966). At the same time that it proposes broadening the Fourteenth Amendment to meet its requirements in this case, Sears seeks to do away with the limitation in Article III, inconvenient here, which requires a case and controversy as the condition precedent to the federal court's power to render decisions.

Since the Board has decided this case on the merits, the temporary injunction Sears seeks, if obtained would have lapsed, *Reynolds* v. *Nashville Building Trades Council*, 383 F.2d 562, 564 (C.A. 6th Cir., 1967). Thus a decision at

this time on Sears' right to obtain injunctive relief from the court below requires an advisory opinion. Any order issued would be wholly ineffectual "for want of a subject matter on which it could operate," *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923); *California* v. *San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893). And it is plain that the line of authority stemming from *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911), through *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), invoked by Sears, is irrelevant. It stands for the proposition that orders, which have lapsed in a formal sense, but which would have a certain and continuing effect on a petitioner's conduct can be the occasion of a live controversy in this court. Here, however, it is fanciful to postulate any continuing effect of the refusal to issue an injunction or the order dismissing its appeal on the conduct of Sears' affairs. Only if Sears files a new 8(b)(4) charge, a complaint is issued, a district court refuses an injunction and the Board refuses to appeal, will this situation be repeated. Plainly, "such speculative contingencies afford no basis" for a determination of Sears claim, *Hall* v. *Beals*, 396 U.S. 45 (1969). The error in its argument to the contrary is that it focuses on the legal question raised rather than on the effects of the order sought. That focus, if adopted, would completely undermine the case and controversy requirement, for every legal question of any consequence is certain to arise with some frequency. If that is all that is required, the courts would be well launched on the course of deciding "abstract propositions of law." *Hall* v. *Beals*, 396 U.S. at 48.

CONCLUSION

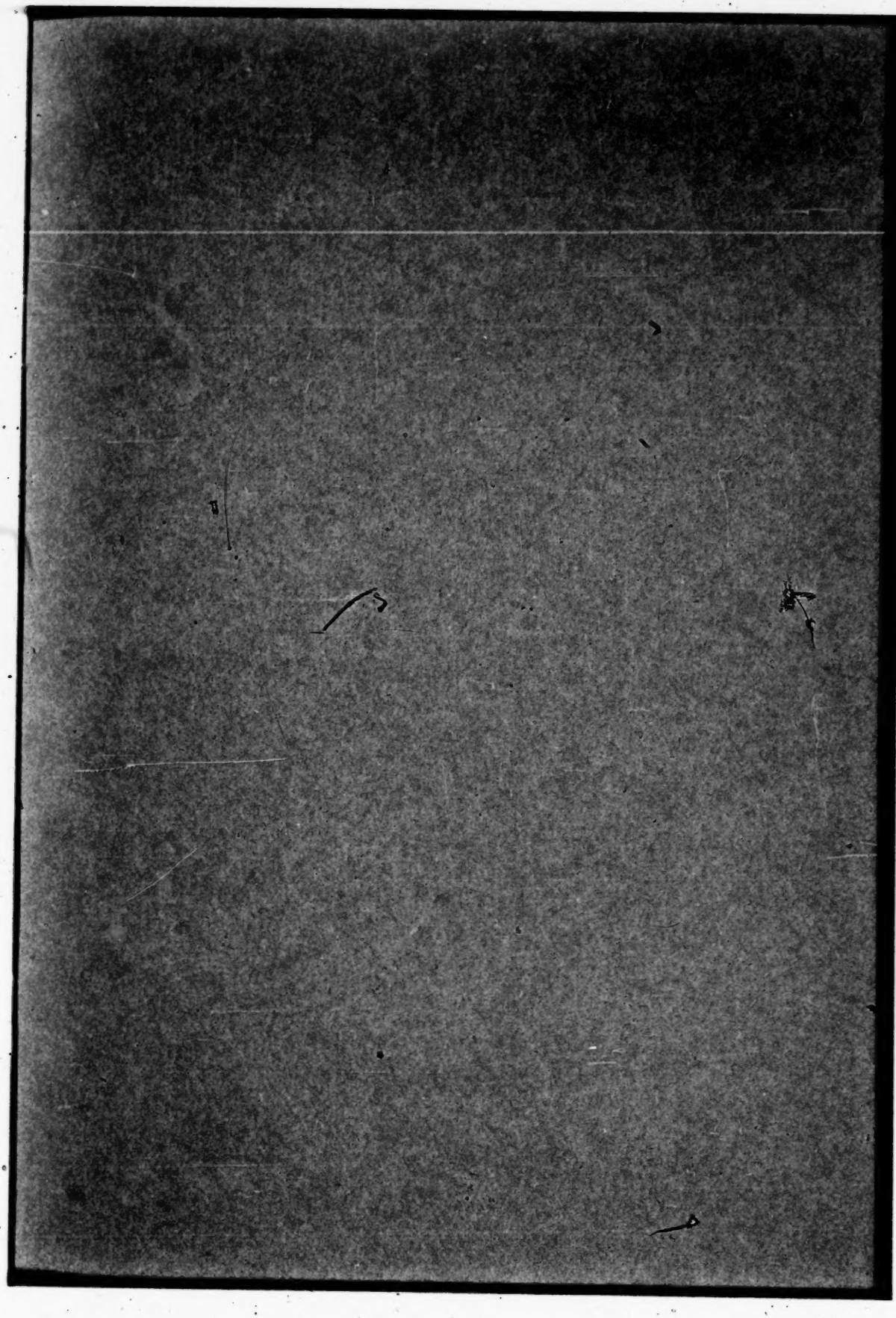
For the reasons stated, as well as those advanced by the Union and the Board, this Court should vacate its order granting the petition for a writ of certiorari on the ground that the case has become moot. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

February, 1970



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In the Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK AND CO., PETITIONER

v.

CARPET LAYERS, ETC., LOCAL UNION NO. 419, AND FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR

ERWIN N. GRISWOLD,
Solicitor General,

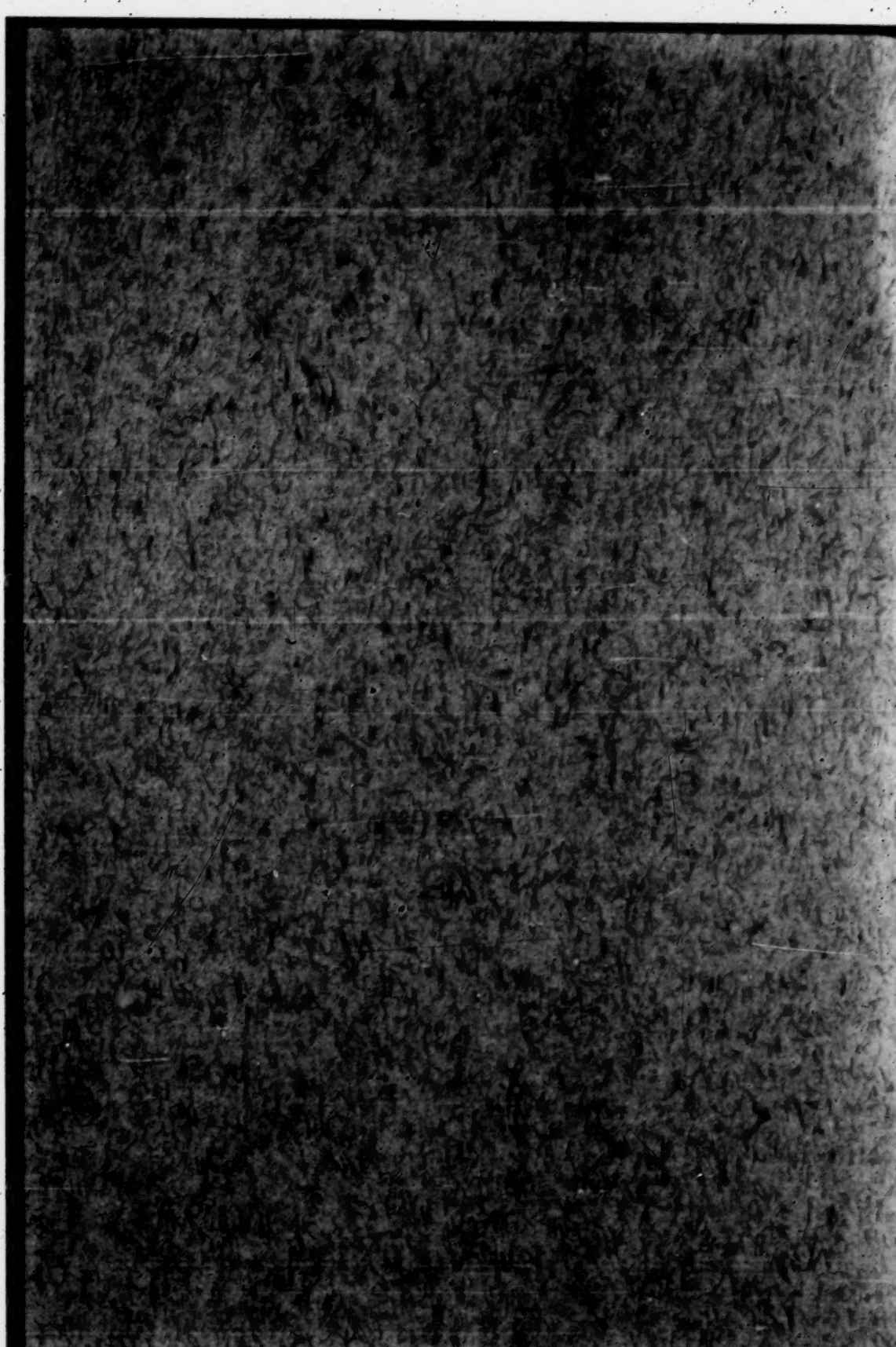
JOSEPH J. [illegible],
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. [illegible]

[illegible],
General Counsel,

[illegible],
Associate General Counsel,

[illegible],
Attorney,

National Labor Relations Board,
Washington, D.C. [illegible]



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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR

OPINIONS BELOW

The opinion of the court of appeals (A. 124–129) is reported at 410 F. 2d 1148. The oral opinion of the district court (A. 22–28) is unreported. The decision and order of the National Labor Relations Board in the underlying unfair labor practice proceeding (A. 130–134, 80–123) are reported at 176 NLRB No. 120.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1969 (A. 124, 129). The petition for a writ

of certiorari was filed on August 15, 1969, and was granted on November 17, 1969 (A. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 33–41.

QUESTIONS PRESENTED

1. Whether, in a proceeding for a temporary injunction brought by the Regional Director of the National Labor Relations Board pursuant to Section 10(l) of the National Labor Relations Act, the party who filed the underlying unfair labor practice charge has standing to appeal the district court's denial of the injunction petition when the Regional Director does not.

2. Whether the issuance of a final Board decision and order in the unfair labor practice proceeding mooted the controversy here, which relates only to temporary relief pending such a final decision and order.

STATEMENT

Petitioner Sears, Roebuck and Company filed a charge with the Regional Director of the National Labor Relations Board alleging that the respondent Union was engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the Act (A. 10–12). Upon investigating the charge and finding reasonable

cause to believe that it was true and that a complaint should issue, the Regional Director, on August 29, 1968, petitioned the United States District Court for the District of Colorado, pursuant to Section 10(l) of the Act, for a temporary injunction pending the final adjudication of the Board with respect to the matter. The petition alleged in substance that there was reasonable cause to believe that the Union was violating Section 8(b)(4)(B), by picketing Sears' premises for the purpose of compelling Sears to cease using the services of Joe and Eddie's Carpet Service, with whom the Union had a primary dispute, to install floor covering sold by Sears (A. 6–7).

Counsel for Sears appeared at the hearing in the district court; he stated that Sears was not seeking "to intervene" but that it was "entitled to be * * * represented by counsel to present any testimony" (A. 13). Counsel was present throughout the hearing, but did not introduce any evidence or examine any witnesses; his actual participation consisted only of informing the court of the availability of a copy of a contract and of a prospective witness for the Board (Tr. 87, 126).[1]

On September 27, 1968, the district court rendered an oral decision, finding that the relationship between Sears and Joe and Eddie's Carpet Service, although

[1] At the close of the hearing, counsel for Sears apparently agreed with the court that, since the interests of Sears and the Regional Director were the same, it would be appropriate to join his brief rather than file a separate one (A. 14). The brief subsequently filed was signed only by counsel for the Regional Director.

not that of employer-employee, was sufficiently close so that Sears could not be considered a neutral in the Union's dispute with Joe and Eddie's. The court concluded that in these circumstances it was improbable that the Board would find that the Union's activity was secondary, and therefore that the Regional Director was not entitled to a temporary injunction. (A. 26–28.) On October 2, 1968, the court entered an order dismissing the Director's injunction petition (A. 28–29).

The Regional Director decided not to appeal the district court's decision.[2] However, Sears, the charging party, sought to do so (A. 30–35). The Regional Director and the Union moved the court below to dismiss the appeal on the ground that Sears lacked standing (A. 36–52). On May 15, 1969, the appeal was dismissed on that ground (A. 124–129). The court of appeals observed that Section 10(l) of the Act was designed to provide temporary relief, pending final adjudication by the Board, only upon the petition of the Regional Director; that it represented an exception to the Norris-LaGuardia Act[3] limitations on the use of injunctions in labor disputes; and that, on its face, it conferred upon the charging party the right only "to appear by counsel and present any relevant testimony." The court concluded that "to read into that restricted right of participation, the right to

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[2] On the same day that the petition for an injunction had been filed, the director had issued a complaint on Sears' charge (A. 15–21), and a hearing before a Trial Examiner of the Board commenced on October 8, 1968 (A. 81).

[3] 29 U.S.C. 101, *et seq.*

initiate appeals, a right traditionally available only to full party litigants, would not only violate every sound principle of statutory construction, but would require a complete disregard for the sensitivity of the labor injunction problem" (A. 127).[1]

Following the decision of the court of appeals, the Board issued its decision and order in the underlying unfair labor practice proceeding, finding that the Union had violated Section 8(b)(4)(B) of the Act (A. 130–134). The Union has filed a petition to review that decision in the Court of Appeals for the District of Columbia Circuit, the Board has filed a cross-petition for enforcement, and Sears has intervened in that proceeding (A. 135–141).

SUMMARY OF ARGUMENT

I

Section 10(l) of the Act is a narrowly drawn exception to the firmly established federal policy against labor injunctions. It authorizes the district courts to issue temporary injunctions, pending final adjudication by the Board, against secondary boycott activity and certain other unfair labor practices. The private party alleging injury from a secondary boycott may not himself bring suit for an injunction. Only the Board's Regional Director may petition for an injunction under Section 10(l), after the private party has lodged unfair labor practice charges with the Board. The statute provides that the Director shall petition for a temporary injunction when he has reasonable

[1] The court below also rejected Sears' alternative position that it be allowed to intervene in order to prosecute the appeal, on the ground that it should not be allowed to obtain indirectly what it could not obtain directly (A. 129).

cause to believe that the charge is true and that an unfair labor practice complaint should be issued. The decision to institute a Board proceeding, however, is within the discretion of the Regional Director and cannot be compelled by the charging party. When the Director does file a petition for an injunction, Section 10(l) affords the charging party only "an opportunity to appear by counsel [in the district court] and present any relevant testimony." The statute makes no provision for appeals by the charging party from the denial of an injunction, nor does it require the Director to take an appeal.

In light of Congress' express intention to vest complete control over Section 10(l) proceedings in the Board's representative, it is reasonable to construe Section 10(l) as authorizing only the Board's representative to take an appeal where the district court has denied his petition for injunctive relief—and denying such authority to the charging party. This conclusion is confirmed by the legislative history of Section 10(l), which shows that Congress deliberately rejected a proposal to give a private party an independent right to obtain injunctive relief against a secondary boycott, because it feared that this would lead to the indiscriminate use of the labor injunction which the Norris-LaGuardia Act was designed to correct. The Regional Director's decision whether to appeal the denial of Section 10(l) injunctive relief by the district court involves a complex of substantive and policy considerations as important as those involved in his initial decision that a Board com-

plaint is warranted, which is the prerequisite to the availability of injunctive relief. In view of Congress' unwillingness to relax the Norris-LaGuardia Act to permit a private party to obtain an injunction in the first instance, it is unlikely that Congress contemplated that the charging party should be permitted to override the Director's judgment with respect to seeking an injunction at the appellate stage.

II

Since Section 10(l) merely authorizes the issuance of an injunction "pending the final adjudication of the Board with respect to [the] matter," the power to issue such injunctive relief expires upon final Board adjudication. Subsequent to the decision of the court of appeals herein, the Board issued its decision in the underlying unfair labor practice proceeding. Therefore, the question which Sears sought to raise on appeal—whether the district court properly denied injunctive relief under Section 10(l)—has become moot. There is no occasion to decide Sears' standing to maintain such an appeal, for any decision in Sears' favor necessarily would result, on remand, in the dismissal of the injunction petition on the ground of mootness.

ARGUMENT

I. THE CHARGING PARTY IN A LABOR BOARD PROCEEDING LACKS STANDING TO APPEAL THE DENIAL OF THE REGIONAL DIRECTOR'S PETITION FOR A TEMPORARY INJUNCTION PURSUANT TO SECTION 10(L) OF THE ACT.

Section 10(l) of the National Labor Relations Act provides that upon the filing of charges alleging an

illegal secondary boycott or violation of certain other sections of the Act,[7] the Board's regional official shall give priority to the investigation of such charges and, "[i]f, after such investigation," he "has reasonable cause to believe such charge is true and that a complaint [initiating proceedings before the Board] should issue, he shall, on behalf of the Board," petition the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." Section 10(l) further provides that—

> Upon the filing of any such petition, the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony. * * * [Emphasis added.]

The precise language chosen by the Congress in establishing this special procedure shows its intention to vest control over the Section 10(l) proceeding in a Board representative and to restrict the charging party to the limited role specified in the statute. The

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[7] Sections 8(b)(4) (A), (B), or (C), Section 8(e), and Section 8(b)(7). Section 10(l) also is applicable to charges involving Section 8(b)(4)(D), prohibiting jurisdictional strikes, in situations where temporary injunctive relief is necessary (compare Section 10(k)).

[8] This function, like the function of filing the complaint that begins the proceedings before the Board, has been delegated to the Regional Director, who, by virtue of Section 3(d) of the Act, exercises it under the supervision of the General Counsel of the Board.

Section 10(l) proceeding is merely ancillary to the unfair labor practice proceeding that has begun before the Board by the issuance of a complaint under Section 10(b) of the Act. The district court's function is not to adjudicate that controversy, but only to determine whether there is reasonable cause to believe that the unfair labor practice charge will be sustained and whether temporary injunctive relief would be just and proper.[1] And it may only grant "injunctive relief pending the final adjudication of the Board with respect to [the unfair labor practice] matter".[2] The legislative history, which we next discuss, confirms that injunctive relief is to be granted only at the instance of the Regional Director.

V. THE LEGISLATIVE HISTORY OF SECTION 10(L) ESTABLISHES THAT CONGRESS INTENDED TO PRECLUDE PRIVATE PARTIES FROM SEEKING AND ENFORCING INJUNCTIVE RELIEF

1. Section 10(l), in substantially its present form—permitting only the Board to seek injunctive relief—was contained in the bill (S. 1126) reported by the

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[1] See, *e.g.*, *Douds* v. *Milk Drivers Union*, 248 F. 2d 534, 537 (C.A. 2); *Schauffler* v. *Local 1291, International Longshoremen's Ass'n*, 292 F. 2d 182, 187–188 (C.A. 3); *Madden* v. *Int'l Organization of Masters, Mates & Pilots*, 259 F. 2d 312, 313–314 (C.A. 7), certiorari denied, 358 U.S. 909.

[2] The findings of a district court in a Section 10(l) proceeding are not binding on the Board in deciding the case on the merits, or on the court of appeals in reviewing that decision. *National Labor Relations Board* v. *Denver Building Council*, 341 U.S. 675, 682. As stated in *McLeod* v. *Local 25, Int'l Bro. of Electrical Workers*, 344 F. 2d 634, 638 (C.A. 2):

> [w]hen relief is sought under Section 10(*l*), the Board, rather than the federal district court, remains the "primary fact finder" and "primary interpreter of the statutory scheme," * * * subject, of course, to judicial review * * * under § 10(e) and § (f).

Senate Labor Committee in 1947, 1 Leg. Hist. of the Labor Management Relations Act 131–132. The Senate report, commenting on Section 10(l) and the companion provision, Section 10(j),[9] stated:

> Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the *public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 8; 1 Leg. Hist. 414, emphasis added.]

The report added (S. Rep. at 27; 1 Leg. Hist. 433):

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under

[9] Section 10(j) gives the Board discretionary authority to petition the district court for similar temporary injunctive relief in respect to other types of unfair labor practices.

> the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. * * *
>
> In subsections (j) and (l) the Board is given additional authority to seek injunctive relief. * * * Thus the Board need not wait, if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order.

When the bill reached the Senate floor, Senator Ball proposed an amendment which would have given "an injured party * * * suffering from a secondary boycott or jurisdictional strike, * * * the right to go directly into a district court and seek injunctive relief." 93 Cong. Rec. 4835; 2 Leg. Hist. 1350. The proponents of this amendment argued that secondary boycotts are so objectionable that the injured person should have "the right to control its own litigation, to hire its own lawyer, to take such steps as it deems proper, and to go into such court as it deems proper to proceed in"; the injured party "should not have to depend * * * upon the judgment of some bureaucrat in whom is lodged the power to determine whether such a course should be followed." 93 Cong. Rec. 4837, 2 Leg. Hist. 1353. See also 93 Cong. Rec. 4835–4836, 4838; 2 Leg. Hist. 1350–1351, 1355. The opponents contended, on the other hand, that to permit private parties to obtain injunctive relief for alleged unfair labor practices would open the door to the abuses of the labor injunction which led to the enactment of the Norris-LaGuardia Act, 29 U.S.C. 101, *et seq.* See, *e.g.*, 93 Cong.

Rec. 4133, 4839, 4843, 4846; 2 Leg. Hist. 1057, 1356-1357, 1364–1365, 1369.

Senator Taft, finding "that opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional strikes seemed to be so strong," proposed that the language of the Senate bill authorizing the Board alone to obtain injunctive relief be retained, and that the private party be given "the right to sue for damages." 93 Cong. Rec. 4843–4844, 2 Leg. Hist. 1365. The Ball amendment was thereafter defeated (93 Cong. Rec. 4847, 2 Leg. Hist. 1370), and Senator Taft introduced his substitute, which he explained as follows (93 Cong. Rec. 4858, 2 Leg. Hist. 1370–1371):

> This is similar to the Ball amendment, dealing with jurisdictional strikes and secondary boycotts. It eliminates the injunctive process, the suspension of the Norris-LaGuardia Act, which I found was creating so much difficulty and opposition to the Ball amendment. It retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.

Senator Taft's amendment, the present Section 303 of the Labor Management Relations Act, was adopted. 93 Cong. Rec. 4874, 2 Leg. Hist. 1400. After the Senate provisions had been approved by the House-Senate Conference Committee, Senator Taft stated:

> The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions regarding injunctions are exactly those which

> were in the Senate bill, and were approved by the Senate. The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes. In such cases the injunction can be obtained only through the National Labor Relations Board. * * * [93 Cong. Rec. 6445–6446, 2 Leg. Hist. 1544.]

In sum, the relevant legislative history shows that a proposal which would have given a private party the right to obtain injunctive relief against a secondary boycott was rejected because of the fear that this would lead to the indiscriminate use of the labor injunction which the Norris-LaGuardia Act was designed to correct. The Congress determined to make a narrow exception to the Norris-LaGuardia Act only for injunction suits brought by a Board representative,[10] thereby assuring that no injunction would be issued unless a Labor Board official had satisfied himself that there was reasonable cause to believe that the unfair labor practice charge had sufficient merit to warrant a Board proceeding. See *Building and Construction Trades Council* v. *Alpert*, 302 F. 2d 594, 596–599 (C.A. 1). The only remedy allowed a private party, at his own instance, was a suit for damages under Section 303 of the Labor Management Relations Act.

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[10] Section 10(l) of the Act authorizes the district court to grant injunctive relief "notwithstanding any other provision of law." Moreover, Section 10(h) states that the Norris-LaGuardia Act shall not apply "[w]hen granting appropriate temporary relief or a restraining order * * * as provided in this section * * *."

2. In view of the language of Section 10(l) and its legislative history, the courts have held that a private party cannot maintain a suit to enjoin an unfair labor practice and that an injunction action may be instituted only by the Board or its representative pursuant to Section 10(l) (or Section 10(j)) of the Act. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4); *Amalgamated Ass'n of Street and Motor Coach Employees* v. *Dixie Motor Coach Corp.*, 170 F. 2d 902 (C.A. 8). It has further been held that the decision to issue an unfair labor practice complaint, which is prerequisite to the filing of an injunction petition, is within the discretion of the Board's Regional Director, subject to review only by the General Counsel and not in the courts. *Meckins, Inc.* v. *Baird*, 320 F. 2d 445, 449–450 (C.A. 5); see also *McLeod* v. *Local 239, International Bro. of Teamsters*, 330 F. 2d 108, 111–112 (C.A. 2).

Moreover, the right of the charging party to appear by counsel in a Section 10(l) proceeding and to present relevant testimony does not authorize it to press for relief on a theory not advanced by the Regional Director. As the Court of Appeals for the Second Circuit has stated:

> To do otherwise would not only increase the danger of over-involvement on the part of the federal courts but would also ignore the expertise which section 10(*l*) commands us to attribute to the Regional Director. It is his view of the facts and law the district judge is to evaluate in a section 10(*l*) proceeding. * * * [T]he principal role in these proceedings is

> to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant. * * * [*McLeod* v. *Business Machine Mechanics Conference Board*, 300 F. 2d 237, 243 (C.A. 2); footnote omitted.]

And if an injunction is issued, only the Regional Director, and not the charging party, has standing to institute contempt proceedings for violation of the injunction. *Phillips* v. *United Mine Workers, District 19*, 218 F. Supp. 103 (E.D. Tenn.); *Shore* v. *Bldg. Trades Council*, 50 LRRM 2139, 2141 (W.D. Pa.); cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261.

B. IN LIGHT OF ITS LEGISLATIVE HISTORY—SHOWING THAT SECTION 10(l) IS A NARROW EXCEPTION TO THE STRONG FEDERAL POLICY AGAINST LABOR INJUNCTIONS—SECTION 10(l) SHOULD NOT BE INTERPRETED TO ALLOW APPEAL BY A PRIVATE PARTY, WHICH CONGRESS DID NOT EXPRESSLY PROVIDE AND WHICH WOULD BE INCONSISTENT WITH THE PROPER EXERCISE OF THE REGIONAL DIRECTOR'S DUTIES

Although Section 10(l) of the Act makes it mandatory for the Regional Director to petition for a temporary injunction upon finding reasonable cause to believe that a secondary boycott charge has merit, Section 10(l) says nothing about the Regional Director's obligation to take an appeal should the district court deny his request for an injunction. The statute's silence indicates that the decision whether to take such an appeal, under the general provisions of 28 U.S.C.

1292 (a)(1), is within the discretion of the Regional Director and we do not understand Sears to contend otherwise. The statute makes no provision for appeal by a charging party; the question presented is whether the charging party nonetheless has standing to appeal on its own where the Regional Director has decided not to seek review of the district court's denial of his petition for an injunction.

Normally only a party to the proceedings in a lower court has standing to appeal its judgment. See *In re Leaf Tobacco Board*, 222 U.S. 578, 581. Since the charging party is neither petitioner nor respondent in a Section 10(1) proceeding in the district court—the statute entitles it only "to appear by counsel and present any relevant testimony"—it is doubtful whether the charging party has the status of a full party in the district court litigation which would entitle it to appeal. More important, however, there are sound policy considerations for concluding that Congress' failure to make any provision for appeal by the charging party should be interpreted as denying to the charging party any standing to take an appeal from the dismissal of a Section 10(1) injunction petition. In view of the substantive and policy questions, relevant to the Board proceeding, which are presented by the district court's denial of an injunction, a holding that the decision whether to appeal rests exclusively with the Regional Director is more in harmony with the Congressional judgment entrusting the injunction proceeding to the initiative and control of the Director than is Sears' position that, once the injunction pro-

ceeding has been instituted, the charging party can pursue that relief for its own benefit, contrary to the independent judgment of the Director.

The Regional Director's decision whether to appeal the denial of a Section 10(l) injunction does not involve only "manpower or budgetary reasons unrelated to the merits of the case" as Sears suggests (Br. 16). The Regional Director's initial decision to seek injunctive relief involves a judgment whether there is reasonable cause to believe that an unfair labor practice has occurred and whether Board proceedings should be instituted. The court, in turn, must be persuaded that there is reason to believe that the unfair labor practice charge will be sustained and that injunctive relief is just and proper in the circumstances. Should the district court decline to issue an injunction, there may be several reasons, in the light of the court's opinion, upon which the Regional Director might properly conclude that it would be inappropriate to continue to press for an injunction by taking an appeal.

Thus, if the case presents a novel or difficult legal question, the Regional Director or the General Counsel may conclude that, in view of the district court's decision in the union's favor, the ultimate resolution of the issue might be prejudiced if it were presented to the court of appeals before the Board had an opportunity in the unfair labor practice proceeding fully to articulate a rationale for a different position. Similarly, should the district court deny injunctive relief on the ground that the facts of the case are

similar to those of another case in which the Board found no unfair labor practice, the Regional Director, while continuing to believe that the cases are distinguishable, may conclude that there is sufficient doubt as to the merits of the unfair labor practice charge to await the views of the Board itself. Both of these problems were present here: The district court declined to issue an injunction because it found that, although there was not an employer-employee relationship between Sears and the carpet service, there were nonetheless sufficient ties between the two to deprive Sears of a neutral status protected by Section 8(b)(4)(B),[11] and because it viewed the facts here as similar to those in another case in which the Board had recently found no unfair labor practice (A. 26-27).

In these, as well as other situations, the Regional Director's decision whether to appeal the district

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[11] The question whether a person who hires an independent contractor is a "neutral" to the contractor's labor dispute for purposes of Section 8(b)(4)(B) has been a vexing one in the administration of the Act. See *Local No. 24, Int'l Bro. of Teamsters* v. *National Labor Relations Board*, 266 F. 2d 675 (C.A.D.C.); *Building Service Employees Union, Local 32-J* v. *National Labor Relations Board*, 313 F. 2d 880 (C.A. D.C.). Moreover, the determination of independent contractor status itself leaves much room for varying judgments. See *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254.

[12] The Regional Director may conclude, for example, that on the facts as found by the district court, there is no longer a legal predicate for an injunction, but nonetheless decide to continue the proceeding before the Board in the expectation of developing a fuller record and thus obtaining more favorable factual findings. Or the Regional Director, in an effort to persuade the Board to change its position, may seek an in-

court's denial of Section 10(l) injunctive relief involves a complex of substantive considerations which are as important as those involved in the initial decision to issue a complaint and seek injunctive relief. It is most consistent with the expressed intention of Congress to conclude that the evaluation of these considerations should be made exclusively by Board officials. To permit the charging party to appeal the denial of injunctive relief where the Regional Director has decided not to do so, would enable a private party to override the Director's judgment that an injunction is no longer appropriate in the circumstances, and to seek an injunction on its own. It is therefore unlikely that Congress, which was unwilling to relax the Norris-LaGuardia Act to permit the charging party to obtain an injunction in the first instance, would have been willing to relax it to permit it to do so at the appellate stage.[12]

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junction in the face of an outstanding Board decision to the contrary; should the district court deny an injunction because of that decision, the Director could appropriately decide not to appeal in the injunction suit and continue the proceeding before the Board. See *McLeod* v. *Business Machine Mechanics Conference Board*, 300 F. 2d 237, 241-242 (C.A. 2). Or the Regional Director may decide not to appeal because the union has ceased its picketing and has given the Director satisfactory assurance that it will not be resumed pending a final decision of the unfair labor practice case by the Board (see n. 18, *infra*).

[12] Thus, in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, the Court declined to find that Section 301 of the Labor Management Relations Act impliedly authorized an injunction against breach of a no-strike clause in a collective bargaining agreement, on the ground that a clearer manifestation of congressional intent is required to effect any such partially repealing effect upon such a long-standing, carefully thought out

There is only surface appeal in Sears' contention (Br. 31–38) that, once the Regional Director has decided to institute an injunction suit, the Norris-LaGuardia Act no longer constitutes a bar to the charging party's effort to obtain an injunction on appeal, so long as he does not go beyond the Regional Director's theory of the case. This argument rests on the assumption that, since the Regional Director has already developed the record and his legal theory in the district court, there can be no real conflict with the Director's position by permitting the charging party to prosecute an appeal where the Director has declined to do so.

As we have shown, however, the Director's decision against appeal rests upon substantive and policy considerations which relate essentially to the merits of the unfair labor practice charge in light of the hearing in the district court and the court's decision. To permit the charging party to take an appeal and thereby continue to press for an injunction does in fact place the charging party in opposition to the Director's considered judgment that an appeal is not ap-

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and highly significant part of this country's labor legislation as the Norris-LaGuardia Act" (*Id.*, at 203, footnote omitted). (But compare *The Boys Markets, Inc.* v. *Retail Clerk's Union*, No. 768, O.T. 1969, certiorari granted, January 12, 1970.) And, as the Court stated in *Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330, respecting the Norris-LaGuardia Act: "There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation, itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted" (*Id.*, at 335).

propriate in the prosecution of the unfair labor practice complaint."

The possibility of conflict is not remote. In this case, for example, the trial examiner, prior to oral argument on Sears' appeal in the Tenth Circuit, issued his decision finding that the Union had violated Section 8(b)(4)(B). But the favorable decision of the examiner here is entirely irrelevant to Sears' theory of standing to appeal the denial of a Section 10(l) injunction. Even if the examiner had ordered the complaint dismissed, and the General Counsel had determined not to file exceptions with the Board, Sears

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[11] *Retail Clerks Union, Local 137* v. *Food Employers Council*, 351 F. 2d 525 (C.A. 9) (Sears Br. 22, n. 3, 33-35), is distinguishable from the situation here, as the Ninth Circuit itself recognized in *Henderson* v. *Int'l Union of Operating Engineers, Local 701*, 73 LRRM 2111, 2114, n. 2, decided December 11, 1969. See also *Los Angeles Herald Examiner* v. *San Francisco-Oakland Newspaper Guild*, No. 409, O.T. 1968, certiorari denied, 393 U.S. 926. In *Retail Clerks*, the issue was whether the district court had discretion to grant the injunctive relief originally prayed for by the Regional Director, notwithstanding the fact that the Director had meanwhile entered into a settlement agreement with the respondent union which he believed obviated the need for injunctive relief. The court of appeals held that the district court did have that discretion, for it had the ultimate responsibility for determining the appropriateness of injunctive relief and would otherwise be little more than a rubber stamp for the Regional Director. *Id.* at 530-531. The court of appeals emphasized that its holding was concerned only with the respective roles to be played in the Section 10(l) proceeding by the Regional Director and the district court, and that it was not defining "the limits of the scope of participation to be permitted the charging parties." *Id.* at 529, n. 2. Moreover, the appeal in that case was not taken by the charging parties, but by the respondent union; the charging parties were merely permitted to participate in the appeal as *amici curiae*. *Id.* at 528.

would still claim that it had the right to pursue its appeal in the court of appeals and press for an injunction notwithstanding the fact that the Board's counsel had discontinued the prosecution of the unfair labor practice case. Sears' position that the life of a Section 10(l) injunction extends until the end of the appellate process for review of the Board's decision in the unfair labor practice proceeding—a position which Sears has taken to avoid our contention that this case is moot (see pp. 27–30, *infra*)—highlights the necessary implication of Sears' standing contention. Thus, in the foregoing illustration, even after the Board had sustained the examiner's dismissal of the complaint, Sears would claim a right to maintain its appeal seeking an injunction against the Union at least until it exhausted its appellate remedies to set aside the Board's decision. It is clear, of course, that Sears' position in the Section 10(l) appeal would be diametrically opposed to the General Counsel's position in the Section 10(f) appeal.

Section 10(h) of the Act adds nothing to Sears' argument (see Br. 38–39). That section provides that the Norris-LaGuardia Act shall not be applicable—

> When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section * * *.

The subsections of Section 10, however, make plain that injunctive relief can only be obtained by the Board or its representative. Thus Section 10(j) and

(1) permit only the Board or its representative to petition the district court for a temporary injunction, and Section 10(e) authorizes only the Board to petition the court of appeals "for appropriate temporary relief or restraining order." Section 10(f) merely permits a person aggrieved by a Board order to "obtain a review of such order" in the court of appeals; only the Board can seek enforcement of the order (see *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 266), and the reference in Section 10(f) to the court of appeals granting "such temporary relief or restraining order as it deems just and proper" is also limited to relief sought by the Board. As the Court stated in *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442:

> The short answer to the argument that * * * [Section 10(h)] has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.

C. THE POLICIES WHICH JUSTIFY INTERVENTION BY PRIVATE PARTIES ON JUDICIAL REVIEW OF FINAL BOARD DECISIONS ARE NOT APPLICABLE HERE

In *Local 238, United Automobile Workers* v. *Scofield*, 382 U.S. 205, this Court held that, when the Board has entered an order at the culmination of unfair labor practice proceedings under Section 10(c)

of the Act, either the successful charging party (where the Board finds a violation of the Act (*Fafaire*))[1] or the successful charged party (where the Board dismisses the complaint (*Scofield*)) has the right to intervene in proceedings brought in the court of appeals to review the Board's order. The present case involves, however, a different situation, and the considerations which led the Court to permit intervention in those cases are not present.

In the underlying unfair labor practice proceeding under Section 10(c) of the Act, the person filing the charge participates as a full party pursuant to agency regulations. As the Court noted in *Fafaire*, in addition to being able to "call witnesses and cross-examine others, [he] may file exceptions to any order of the trial examiner, and may file a petition for reconsideration [of] a Board order." 382 U.S. at 219. Moreover, if the Board dismisses the complaint, Section 10(f) of the Act permits the charging party, as a "person aggrieved," to seek review of the dismissal order in the court of appeals. In these circumstances, the Court concluded that the charging party's role in the unfair labor practice proceeding entitled him, where he had succeeded before the Board, and the Board's final order was before the court of appeals either on the losing party's petition to review or the Board's petition for enforcement, to become a party in the court of appeals proceeding. The Court emphasized that, since the proceeding was already in the court of

[1] Two cases were covered by the Court's opinion—*Scofield* (involving the successful charged party), and *Fafaire* (involving the successful charging party).

appeals for decision, to permit such intervention could not affect the Board's discretion respecting whether to initiate a court of appeals proceeding.

Section 10(l), on the other hand, merely affords the charging party "an opportunity to appear by counsel and present any relevant testimony," and his participation before the district court is in fact limited. There is no provision comparable to Section 10(f) which would specifically authorize an appeal by the charging party where he is "aggrieved" by the denial of injunctive relief. And the legislative history of Section 10(l) shows that Congress deliberately intended to deny private parties the right to seek injunctive relief against secondary boycotts and other unfair labor practices. In these circumstances, unlike those on judicial review of the Board's decision, to permit the charging party to institute an appeal from the denial of a Section 10(l) injunction where the Regional Director has declined to do so would give the charging party a substantially greater role in the proceeding than he had previously enjoyed and Congress had specifically authorized. Moreover, as we have shown, it would entail a real danger of impairing the control over the proceeding which Congress intended to entrust solely to the Board or its representative.

Finally, *Fafnir* involved a review of final Board orders, entered after full administrative proceedings. If a charging party who prevailed before the Board were denied the right to participate fully at the appellate stage, he might be deprived of the permanent relief which he sought and obtained through the administrative proceedings, without having had an ade-

quate opportunity to present his views. A temporary injunction under Section 10(l), on the other hand, is effective only during the pendency of the administrative proceedings and the injunction proceeding is expressly not a final adjudication of the parties' rights under the Act. To be sure, the charging party has an interest in obtaining temporary injunctive protection against secondary boycott activity (see Sears' Br. 16, 18-19), But Congress, weighing that interest against the danger of misuse of the injunctive power, authorized the granting of injunctive relief in a proceeding instituted and managed by only the Board's representative, and ancillary to the Board proceeding which will be dispositive of the charging party's rights under the Act.

Contrary to Sears' contention (Br. 13-18), to deny the charging party the right to appeal from the district court's denial of an injunction, presents no constitutional question. This Court has made clear that the right to appeal a lower court's ruling is not an essential ingredient of due process of law. *Lee* v. *Pittman*, 243 U.S. 588, 591; *Reetz* v. *Michigan*, 188 U.S. 505, 508. See also, *Ex Parte Abdo*, 247 U.S. 27, 30; there is a broad distinction which exists between the right to be heard in courts of justice on the one hand and the necessity for the grant of authority on the other to review the results of such hearing by proceedings in error or appeal."

Griffin v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353, 357; and *Lane* v. *Brown*, 372 U.S. 477 (Br. 14), stand only for the proposition that, where a state has a statute providing for an absolute right of appellate review, it may not draw an "unconstitutional line * * * between rich and poor" in contravention of the Fourteenth Amendment. The other cases cited, *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, and *St. Joseph Stock Yards Co.* v. *U.S.*, 298 U.S. 38, involve judicial review of *administrative* action, as does the Judicial Review Act, 5 U.S.C. 1032 (Br. 20).

Our submission that jurisdiction to issue a Section 10(l) injunction ends when the Board issues its unfair labor practice decision is consistent with the role of Section 10(l) in the statutory scheme. Section 10(l), and its companion Section 10(j), were added to the Act to enable the Board to obtain temporary injunctive relief against unfair labor practices without having to await a final Board decision and order, as it had been required to do under the Wagner Act (*supra*, pp. 10–11). But after the Board has issued a decision and order, there is no longer any need to proceed in the district court for an injunction. If the Union were to continue its picketing after issuance of the Board's decision holding that activity to violate Section 8(b)(4)(B), the Board could petition the court of appeals under Section 10(e) for injunctive relief pending that court's full review of the Board's decision and order.[14] See *McLeod v. Business Machines Mechanics Conference Board*, 300 F. 2d 237, 241 (C.A. 2); cf. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597.

Therefore, the question whether the district court properly denied injunctive relief under Section 10(l)—the question which petitioner sought to raise

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sons noted by Judge Rives in his dissent (*id.* at 871–872). Moreover, it appears to have been undermined by the subsequent decision in *Monjqua*, *supra*.

[14] It has been unnecessary for the Board to seek such relief in this case, because the Union has agreed to discontinue its picketing of Sears until further notice (Sears' Reply to Memorandum in Opposition to Petition for Certiorari, 8A 1). Where injunctive relief is necessary in a case which has been remanded to the Board by the court of appeals, it may be rendered by the court of appeals in the exercise of its jurisdiction under Section 10(e).

in the court of appeals—is now only of academic interest, and any relief which petitioner seeks in this Court would be "wholly ineffectual for want of a subject matter on which it could operate." *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 371, quoting from *Brownlow* v. *Schwartz*, 261 U.S. 216, 217–218. "An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain." *Ibid.* Accord: *Hall* v. *Beals*, 396 U.S. 45; *Brockington* v. *Rhodes*, 396 U.S. 41; *Golden* v. *Zwickler*, 394 U.S. 103; *Harris* v. *Battle*, 348 U.S. 803.

Indeed, a situation virtually identical to the instant case was presented in *Los Angeles Building and Construction Trades Council* v. *LeBaron*, 342 U.S. 802. There, the district court issued a Section 10(l) injunction, 84 F. Supp. 629 (S.D. Cal.), and its decision was affirmed by the court of appeals, 185 F. 2d 405 (C.A. 9). After the union petitioned for a writ of certiorari to review that ruling, the Board issued its decision and order on the merits, 94 NLRB 415. This Court thereupon granted the union's petition and remanded the case to the district court with instructions to vacate its decision and dismiss the injunction petition on grounds of mootness.

The fact that the issue which petitioner seeks to raise in this Court—the charging party's standing to appeal in a Section 10(l) proceeding—is a recurrent

such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or

products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * * * * *

SEC. 10 * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor

practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence

order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued

without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006.

KALVIN M. GROVE,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602.

DONALD L. GIACOMINI,
ROTHGERBER, APPEL & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

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REPLY BRIEF FOR PETITIONER

Petitioner, Sears, Roebuck and Co., files this Reply Brief in order to respond to various contentions, which relate both to the merit of this appeal and to its alleged mootness, which were raised in the briefs of the Respondent Union, the Respondent Regional Director, and the AFL-CIO as *amicus curiae*.

I.

ON THE MERITS OF THE APPEAL

A basic component of Sears' contentions in this case is that appellate review is a mere continuation of a proceeding already instituted and is not a separate, independent cause. *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137. Thus, a charging party's efforts to test the correctness of an adverse decision in a suit properly lodged by the Board in an appropriate court does not constitute the legal equivalent of an independent initiation of a case, particularly where, as here, the appellate contentions of the charging party merely repeat those which the Board had previously made to the inferior court. Unfortunately, neither the Respondents nor the *amicus* have ever addressed themselves to the concept or the implications of appellate review as constituting only a part of a single continuous action; rather, they devote a substantial portion of their argument to the proposition that charging parties may not act unilaterally, directly and independently to initiate suits for injunctive relief without the prior participation or action by the Board. While this proposition is correct, it is not material to Sears' contentions. To that extent, the arguments of the parties have proceeded along parallel rather than converging lines.

Other opposing arguments invite more extended reply.

A. "POLICY CONSIDERATIONS" DO NOT WARRANT A DENIAL OF CHARGING PARTIES' RIGHT TO APPELLATE REVIEW.

The Regional Director argues (Br. pp. 17-19) that the decision as to whether to appeal a denial of injunctive relief under Section 10(l) involves such delicate considerations that such a decision should be entrusted solely to the Board. In support of this assertion, the Director is able to provide only a single basis for concluding that any prejudice to the Board might result from granting charging parties the right of appellate review. This basis con-

sists of the Director's fear that an adverse appellate court decision on a charging party's petition for temporary injunctive relief would unduly influence that court in a subsequent action by the Board for a permanent injunction predicated on a complete evidentiary record. Such a view reflects a startling lack of confidence in the appellate courts to function properly in the adjudication of each case before them. This view also ignores the fact that when the Board's representatives have concluded that a violation of law has occurred and charging parties' rights and interests are in jeopardy, then those charging parties should be entitled to the immediate relief which the Act provides for their benefit. Moreover, each of the reasons cited by the Director which is said to justify entrusting to him the exclusive right to determine whether appellate review should be sought in 10(l) cases (excluding decisions made for manpower or budgetary reasons), is predicated on the Director's alleged desire to prevail in the ultimate litigation on the underlying merits of the parties' dispute. However, such an ultimate "victory" would afford little solace to the charging party without earlier injunctive relief from the damaging effects of continuing unlawful picketing and boycotts."

Moreover, the fact that the Director persists in the prosecution of a Complaint before the Board necessarily establishes his belief that the charging party's rights were unlawfully infringed. Otherwise, the Director would be guilty of harassing an innocent respondent merely in order to test a legal principle. Nor is it reasonable for the Director to suggest (Br., p. 18, fn. 12) that he should have the discretion to prevent the appeal of a non-meritorious case to the Court of Appeals so as to improve his chances of winning it before the Board. If a case is worthy of prosecution before the Board on the grounds that a charging party's rights were violated, and if the violation of those rights entitle the charging party to temporary injustive relief pending the Board's adjudication, then, con-

trary to the Director's position, every avenue should be open to the charging party to obtain such injunctive relief, including appellate review.[1]

Similarly, the Director's assertion that he should have the exclusive right to manage and control the entire course of litigation in all injunction proceedings under Section 10(l), including the sole decision as to whether to seek appellate review, is unsound. The Director is not authorized to exercise such control in proceedings before the agency; no basis has been suggested to justify according him a greater role before the courts. For example, in a hearing before a Trial Examiner on the Director's Complaint, the Director may not control the extent and nature of the charging party's participation in the examination of witnesses. *Spector Freight*, 141 NLRB 1110. Nor may the Director freely withdraw elements of his Complaint without the permission of the charging party. *General Maintenance Engineers*, 142 NLRB 295. Nor may the Director settle the case and withdraw his Complaint without affording the charging party a hearing on his objections to the settlement; nor may the Director deprive the charging party of appellate review of the Director's decision to settle. *Leeds & Northrup* v. *NLRB*, 357 F. 2d 627 (CA 3, 1966).

In *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525 (CA 9, 1965), the Ninth Circuit specifically held that the same inability of the Regional Director completely

[1] It should additionally be noted that the Director's alleged reasons for failing to appeal the denial of injunctive relief in this case, which reasons are suggested in his brief (p. 18), were never communicated to Sears despite Sears' request for that information. Attached as Appendices G and H (pp. 32-33) are copies of Sears' request and the Director's reply. Under such circumstances, "the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action . . .'" *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444.

to control the course of litigation before the agency also applies in cases under Section 10(l). Although that court approved the granting of injunctive relief at the urging of the charging party and over the Director's objections, both the Director and Respondent Union have attempted to characterize the case as holding only that a district court has discretion to afford "appropriate" relief whether requested by the Director or not. (Dir. Br., p. 21; Union Br., p. 36).

Such a limited interpretation of that case will not survive analysis. If the Director does not seek injunctive relief the court will not grant it *sua sponte*. It is not enough to say that the filing of a petition confers jurisdiction on the court to grant any appropriate relief; who has standing to urge that relief on the court when the Director determines not to do so? The *Retail Clerks* case held, therefore, not only that the filing of the petition confers jurisdiction on the courts, but also that charging parties have standing to move independently of the Board to urge such relief when the Board is unable or unwilling to do so. Indeed, this is the explanation for the Court's extensive discussion of the nature of charging parties' rights in cases under Section 10(l). Were the Court merely limiting its holding to the narrow issue of the presence of the Court's jurisdiction, and not to the question as to how and at whose urging it would be exercised, then its analysis of charging parties' rights would constitute merely an extended superfluity; its decison would then leave the parties as uninformed as to their claimed rights as they were before the Court undertook to adjudicate them. It should be clear that the *Retail Clerks* Court neither intended nor achieved so limited and peculiar a result.

The next step is dictated by logic. If charging parties may urge the correctness of the Director's petition in the district court when the Director elects not to do so, then may they not similarly urge its correctness in the appellate courts when the Director similarly elects not to do so. In each case the charging parties do nothing more than to seek

to persuade a court that the Director's request for relief was appropriate and should be granted for the reasons stated in that petition. In both cases the charging parties in no way expand on his position: the petition they support is the Director's; the factual bases alleged were alleged by the Director; the theories propounded were also propounded by the Director; and the relief sought is that which is consistent with the facts, theories, and legal principles upon which he relied and which were summarized in his petition.

B. THE NORRIS-LA GUARDIA ACT DOES NOT BAR APPELLATE REVIEW BY CHARGING PARTIES.

The attempted reliance by the Respondent Union, and the AFL-CIO on the provisions of Norris-LaGuardia and its legislative history to defeat the limited and circumscribed right of appeal herein sought by Sears is patently inappropriate. (Union Br. 25-31; AFL-CIO Br. 8-12). Section 7 of Norris-LaGuardia prescribes strict procedural requirements for the initial issuance of an injunction in a labor dispute and Section 4 lists the kinds of acts which gave rise to the abuse of power by the federal judiciary in exercising its injunctive powers. (*Textile Workers* v. *Lincoln Mills*, 353 U.S. 448). A review of these provisions and their legislative history plainly indicates that to afford to Sears the right herein sought would not serve to revive any of the abuses against which that Act was aimed or endanger the protections against indiscriminate injunctions which the Act clearly forbids. *Textile Workers, supra.*

To afford a charging party (whether employer or union) a full participatory role in a 10(l) proceeding only after the Board has initiated such action in the district court, including a right to appeal from a denial of injunctive relief, in no way conflicts with the paramount danger of judicial abuse with which Congress was concerned during

the legislative debate preceding the enactment of Norris-LaGuardia. It cannot be said, for example, that the allowance of an appeal would serve to reinstate the federal judiciary as "an agency for strike-breaking purposes" or allow federal courts to revive the practice of issuing temporary restraining orders without notice which, *inter alia*, had enjoined such lawful acts as the publication of information about a strike in the newspapers (75 Cong. Rec. 5481); the publicizing of "yellow-dog contracts" (75 Cong. Rec. 5481); or appealing from a forced eviction from Company housing in the state courts even though such right is afforded by state law (75 Cong. Rec. 4507). It was to correct these and related abuses (*e.g.*, the issuance of injunctions based on perjured affidavits without even affording the union notice of the proceeding (75 Cong. Rec. 5479); and the judicial sanction of "yellow-dog" contracts (75 Cong. Rec. 4915)), which prompted the corrective legislation. Norris-LaGuardia was never intended, as Congressman LaGuardia stated, to "prevent the court from restraining any unlawful act", nor does it express a policy hostile to the right to appeal which Petitioner seeks under Section 10(l) of the National Labor Relations Act. (75 Cong. Rec. 5478).

Illustrative of Congress' purpose in enacting Norris-LaGuardia are the following quite typical extracts from the debates in the House of Representatives.

The judicial abuses for whose eradication the statute was drafted were described by Rep. O'Conner to include:

> "Forbidding the unions to pay any strike benefits to strikers; forbidding any person, whether a member of the union or not, to give any aid or assistance to the strikers. Often the injunctions have gone so far as to forbid attorneys to advise the strikers as to their rights even in proceeding to dispossess the strikers from their homes. Again some injunctions have prohibited the strikers from giving any publicity to the existence of

the strike or the reason for it, or their justification of it. (75 Cong. Rec. 5463).[2]

These debates revealed not only that the abuses sought to be corrected were totally unrelated to the existence of appellate rights such as Sears seeks here, but also that Congress did not intend this legislation to constitute a blanket bar of injunctive relief in such unrelated areas. According to Rep. Oliver:

> "Injunctions have been used most oppressively in this country. A court issued an injunction to the effect that no striker might talk to another striker about the strike;

---

[2] Another principal abuse which the statute was designed to correct was the denial of a jury trial for contempt in labor disputes. Rep. Browning highlighted this aim when he said:

> "We have situation now by which a man may be enjoined by a federal court without notice, and either through ignorance or intention he violated the injunction. He is arraigned by the court, which is not only the legislature but the jury, the trial judge and the prosecuting attorney; the man is sent to jail, without trial by jury, which is guaranteed to him under the Constitution; and then another court on appeal, two or three years later, will decide that the injunction was wrongfully issued. However, that man has been punished, not only wrongfully, but punished contrary to the fundamentals of the Constitution. I would say that it is not right for such a practice to be perpetuated in this free country of ours, and that is one of the things which is being objected to in the passage of this Bill."

To which Rep. LaGuardia added:

> "This Bill does not prevent the Court from restraining any unlawful Act. This Bill does prevent the federal court from being used as an agency for strike-breaking purposes and as an employment agent for scabs to break a lawful strike. That is what the Bill does. . . . It prevents the federal court from granting an injunction without the hearing of testimony. That is all there is to that. It prevents the courts from prohibiting the performance of lawful acts. It provides for a trial by jury, as was provided in the Act of 1914. It outlaws the yellow-dog contract." (75 Cong. Rec. 5478)

that a striker could not publish in the newspaper that there was a strike; he could not telegraph, telephone or write to anyone in America that there was a strike; that a striker might not even say there was a yellow-dog contract, signed with his name, but coerced from him by his bosses. *We are not trying to have injunctions stopped, but we do not want injunctions which repeal the constitutional and natural rights of labor.*" (75 Cong. Rec. 5481) (Emphasis added)

Similarly, from Rep. Sweeney:

"This measure was intended to curb the abusive power registered by certain federal judges in the promiscuous issuing of injunctions arising out of labor disputes. *It has application only to the inferior federal courts of the nation, and limits the jurisdiction and power of those inferior federal courts.*" (75 Cong. Rec. 5502)

Furthermore, to view the negligibly number of instances when charging parties might desire to appeal from an adverse district court decision as reviving the pre-1932 danger of a "systematic distortion of the judicial function at the behest of business interests with a personal stake in the outcome", is frivolous. (AFL-CIO Br. 8). The Board's most recent statistical data in § 10(l) situations clearly belie such a contention. Thus, of the total of 1815 charges filed in fiscal year 1968 alleging violations of the secondary boycott provisions of the Act, the Board filed petitions in only 165 of those cases. Thirty-Third Annual NLRB Report, Pages 169 and Table 2. During this same period 65 petitions went to final order with the courts granting injunctions in only 57 cases and denying them in eight. Thirty-Third Annual NLRB Report, pages 169-170.[3] Simi-

[3] Since these statistics reflect many unreported district court cases—Counsel for Regional Director, on February 26, 1970, acceded to our request for substantiation of these statistics. That NLRB General Counsel's corrected summary of records for fiscal 1967 reflects 60 injunctions granted, 8 denied, and 1 granted in part, denied in part.

lar results were shown for the preceding year where only eight injunctions were denied. Thirty-Second Annual NLRB Report, page 219. Thus, the appeal rights which Petitioner seeks to sustain herein would affect less than 1% of all secondary boycott charges filed with the Board and less than 5% of the cases in which the Board, having found reasonable cause to believe that a violation exists, petitions the district courts for injunctive relief. And even with respect to this small number of cases, an injunction will issue *only if* the court of appeals concludes from its careful review of the record that the district court's denial of relief was clearly erroneous.

In light of these statistics, it seems evident that neither the purposes nor policies underlying Norris-LaGuardia are in any way endangered if charging parties are afforded the opportunity to correct the relatively few instances where the district courts erroneously deny the Board's application for injunctive relief and, for reasons best known to the Board, the Board chooses not to appeal.[4]

C. THE LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT DOES NOT SUPPORT A NARROW READING OF THE RIGHTS OF CHARGING PARTIES IN SECTION 10(l) PROCEEDINGS

The Regional Director[5] and the Respondent Union[6] argue that the legislative history supports the 10th Circuit's narrow interpretation of the statutory language relating to the rights of charging parties.

fore, that injunctive relief under 10 l has not been improvidently granted; rather, it appears to have been improvidently denied on the occasions of its denial. From this perspective, too, it does not seem that permitting charging parties to seek review of adverse district court orders would revive the abuses which caused the enactment of Norris-LaGuardia or would justify any of the fears expressed in the debates preceding the enactment of Taft Hartley.

[4] See Brief of the Regional Director, Page 13

[5] Brief for Respondent Union, Page 41

which constitutes the terms of the present Act, so far as charging parties' rights are described.

In the light of this background it can fairly be concluded that the compromise in Section 10(l) with respect to charging parties' rights to seek injunctions was arrived at only in order to pass needed legislation over the Presidential veto.[9] Therefore, charging parties' rights in 10(l) proceedings should be broadly construed, subject to the limitations we have urged in Petitioner's Brief, in order to give effect to the strong Congressional purpose to vest substantial judicial rights in charging parties in cases involving secondary boycott activity.

II.

ON THE QUESTION OF MOOTNESS

In its Memorandum in Opposition to Sears' petition for writ of certiorari herein, the Board's principal argument consisted in its claim that the case was now moot and that the petition should, therefore, not be heard by this Court. In its Reply to this Memorandum, Sears responded to this contention.

When this Court subsequently granted Sears' petition, — and without reserving the question of mootness pending argument on the merits, — Sears understood that the issue of mootness was no longer before the Court. Nevertheless, both Respondents and the *amicus curiae* have raised this issue once again in their briefs. To the extent that Sears may be in error in its belief that mootness is no longer a viable issue herein, the following response is made.

[9] Message to Congress, 6 Leg. Ser. Bill Veto p. 1059, 1092

A. THE CASE IS NOT FACTUALLY MOOT: THERE IS A DANGER, IF NOT A PROBABILITY, THAT SEARS WILL BE SUBJECTED TO A RENEWAL OF PICKETING BY RESPONDENT UNION

So far as they relate to the question of mootness, there are few and uncontroverted facts:

1. Respondent Union's unlawful secondary picketing of Sears precipitated the filing of charges by Sears with the Board on August 9, 1968, and caused the Board, after appropriate investigation of the charges, to seek injunctive relief under Section 10(l) of the National Labor Relations Act on August 29, 1968.

2. The District Court refused to grant such injunctive relief in a decision rendered on October 4, 1968.

3. The Board refused to appeal this decision for reasons which it has never disclosed; instead the Board contented itself with prosecuting the Union's unlawful conduct in prolonged and time-consuming administrative proceedings.

4. Sears then sought to appeal the District Court's adverse ruling, an effort which failed when, on May 15, 1968, the Tenth Circuit dismissed the appeal solely on the ground that Sears lacked standing to lodge it.

5. On June 20, 1969, the Board issued its Decision and Order finding the Union guilty of the unfair labor practices charged.

6. The Union engaged in its unlawful picketing continuously and without cease from approximately August 7, 1968 until approximately June 26, 1969.

7. Accordingly, from June 20 until at least June 26, the Union picketed Sears in outright violation of the Board's Order.

8. By letter dated June 26, 1969, the Union, through its counsel, notified the Board's Regional Director that it was undecided as to whether it would comply with the Board's

Order; that it would cease its picketing of Sears only "in the meantime"; and that should the Union elect to resume picketing Sears, it would notify the Board ten days in advance of such resumption.[11]

9. On July 3, 1969, the Union filed a petition to review and set aside the Board's Decision and Order in a case now awaiting decision in the District of Columbia Circuit.[12]

10. This very Union has revealed a ready disposition to engage in those practices which the Board found to be unlawful in its Decision of June 20, 1969, and whose resumption was threatened by the Union in its letter of June 26, 1969. Thus, in four recent instances, three of which occurred subsequent to the Board's Decision in this case, the Board has been forced to seek injunctive relief under Section 10(l) against this same local Union, in the same city, for the same kind of prohibited pressure, against the same class of employers, and pursuant to the same type of dispute, as are involved in the instant Sears case.[13]

In consequence of these enumerated facts, certain conclusions necessarily follow. Respondent Union is engaged

[11] A copy of this letter is attached hereto as Appendix A, page 1. Also attached, as Appendix B, pages 2-5, is a copy of Sear's request, pursuant to which the Union's letter was made available to Sears.

[12] *Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO* v. *NLRB*, Case No. 23223. The Court heard oral argument in this case on January 22, 1970.

The Union's brief in the Court of Appeals, filed on about September 22, 1969, betrays its state of mind on the question of its intention to picket Sears. At page 25 of that brief: "Sears can obtain the immediate surcease of the picketing by the simple measure of giving to its installers the prevailing rates of pay. The Union would then have no cause or reason to continue the picketing and would terminate it forthwith."

[13] Copies of the Board's petitions for injunctive relief under Section 10(l) of the Act in all four instances are attached as Appendices C, D, E, and F, pages 6-31.

in a *continuing* campaign to achieve those ends which it sought in its dispute with Sears. It is prepared to engage in unlawful secondary picketing in furtherance of its imagined interests despite its knowledge that the Board considers such conduct to be illegal. It is prepared to do so, and has done so in this very case, in violation of an outstanding and unequivocal cease-and-desist Order of the Board. Since the Board's Order is not self-enforcing, it offers little deterrence to a Union predisposed to such conduct. Finally, the Union's expressed contemplation of a resumption of picketing emphasizes the jeopardy in which Sears now finds itself as a consequence of the absence of that injunctive relief to which it has always been entitled but has been unable to secure.

The Board's contention that the current appeal is moot is predicated upon the dual assumptions that (i) such injunctive relief is not needed, and (ii) even if it had been granted when sought, it would by now *necessarily* have expired. The fallacy of the first assumption is clear from the foregoing recital of the facts and their implications. The fallacy of the second assumption will now be demonstrated.

B. HAD INJUNCTIVE RELIEF BEEN GRANTED PURSUANT TO SECTION 10(l) OF THE ACT, SEARS COULD PRESENTLY ENJOY THE PROTECTION OF ITS PROVISIONS.

(1) There Has Been No "Final Adjudication of the Board"

Respondent Regional Director contends that injunctive relief under Section 10(l) automatically terminates upon the issuance of the Board's decision on the merits. This view is predicated upon the Regional Director's interpretation of the language of Section 10(l), which provides that injunctive relief may be obtained "pending the final adjudication of the Board". According to his interpretation, the Board's initial Decision and Order is synonymous with "final adjudication" within the meaning of the statute.

That result is required neither by logic, by equity, nor by settled judicial opinion. On the contrary, Sears contends

that a "final adjudication of the Board" should represent only that decision which ultimately and absolutely disposes of the disputed rights and duties of the parties. Accordingly, when the parties effect an amicable settlement of their dispute, which settlement is approved by the Board, that approval constitutes a "final adjudication" as nothing further remains to be resolved. Similarly, when neither party contests the terms of a decision of the Board, that, too, becomes a "final adjudication".

However, when an aggrieved party to a Board decision seeks review in the Court of Appeals, that decision loses its "finality". The court may enforce the Board's Order in whole, in part, or not at all; to the extent it refuses enforcement, the court may remand the case to the Board for a reconsideration of a legal judgment, for the taking of additional testimony, or for both. In circumstances where such appellate review is sought, to label the decision being reviewed a "final adjudication" constitutes an abuse of logic and language. In the instant case, Respondent Union's election to file the currently pending suit in the District of Columbia Circuit to review and set aside the decision of the Board which found the Union in violation of law, removed the "finality" from the Board's adjudication.[11]

Support for Sears' position is found in *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (C.A. 5, 1964). One of the issues in that case concerned the effect of a district court's action in granting injunctive relief under Section 10(l) "pending the final disposition of the matters involved". The court considered whether this grant of relief was impermissibly broad since it would extend beyond the mere issuance of the Board's decision and

[11] There is no reason in logic why a decision of the Board may not constitute a "final order" such that it becomes ripe for appeal, while concurrently constituting less than a "final adjudication" of the dispute so that continuing unlawful conduct may remain enjoinable under Section 10(l).

until the Court of Appeals rendered its own opinion on the merits of the Board's adjudication. The Fifth Circuit agreed that while the district court's action had precisely the effect of prolonging the protection afforded by injunctive relief beyond the mere issuance of the Board's decision, such a result was consistent with the purpose and provisions of the statute:

> "We do not read [the district court's] language as going beyond the premissible scope of an injunction under § 10(l)—'appropriate injunctive relief pending the final adjudication of the Board'."

The Court's conclusion that an adjudication is not "final" when it is subject to reversal, amendment or remand, and when it does not, therefore, constitute "final disposition of the matters involved", is also supported by equitable considerations. Suppose a union were enjoined from engaging in unlawful secondary picketing pursuant to a proceeding under Section 10(l) of the Act. According to the Regional Director's contentions herein, upon the rendering of the Board's non-self-enforcing decision on the merits, the offending union becomes free of the terms of the injunction and free to resume its unlawful picketing.[15] Such a result, held the Fifth Circuit in the *Houston* case, serves, where appellate review is sought:

> ". . . to justify preserving the status quo until the case is finally disposed of in this [appellate] Court. Were

[15] Under this view a resumption of the unlawful conduct could only be remedied by the Board's institution of a new suit for injunctive relief under Section 10(e) of the Act. But the Board is not required and cannot be compelled to do so. Moreover, Sears' experience in the instant case,—where the Board declined to appeal a district court's refusal to grant injunctive relief which the Board believed should have been granted—does not encourage reliance on the Board. In any event, the theoretical availability of such a tenuous concurrent remedy is no substitute for the quicker and more dependable relief afforded by the continuing protection of Section 10(l).

petitioner to ultimately prevail, the beneficial effect of our decision would be largely vitiated, if while awaiting hearing and disposition, the Union were permitted to resume its activities."

(2) The Board's Decision and Order Did Not Decide the Question Involved in the Instant Appeal

An additional and independent basis for rejecting the Regional Director's claim of mootness consists of the fact that the Board's decision, whether or not it is "final", did not adjudicate the question presented to this Court for review. The Board's opinion decided that the Respondent Union violated the labor laws and, by necessary implication, that the district court's refusal to grant injunctive relief was incorrect. But the question presented here for review relates to whether charging parties before the Board have standing to appeal the denial of injunctive relief,—not whether the denial itself was correct. Thus the question before this Court neither was, nor could have been, decided by the Board and, moreover, is totally unaffected by the merits of the Board's decision.

Nor do the authorities cited by the Regional Director or the Respondent Union require the dismissal of this appeal. *Carpenters' District Council* v. *Boire*, 228 F. 2d 454 (CA 5, 1961), involved a situation where the parties executed a formal voluntary bilateral settlement stipulation *following* the union's appeal of the granting of an injunction under Section 10(l). Since the stipulation resolved all matters involved in the injunctive proceeding, the Board's approval of it constituted a "final adjudication" which did render further litigation concerning the injunction moot.

This is entirely consistent with Sears' previously expressed understanding of the meaning of "final adjudication" in Section 10(l). And in both *Monique, Inc.* v. *Boire*, 344 F. 2d 1017 (CA 5, 1965), and *Reynolds* v. *Nashville Bldg. Trades Council*, 383 F. 2d 562 (CA 6, 1967), cited by Respondents, the Board rendered a decision on the merits, while appeals were pending from adverse rulings in cases

under Section 10(l), which also resolved the questions presented in the suits under Section 10(l). Thus a decision by the Courts on the appeals stemming from the injunction proceedings involved nothing more than a review of the merits of the Board's decision. In a sense, therefore, the two cases became merged, with "mootness" the consequence of the merger.

In the instant appeal no such merger has occurred since the issue of standing to seek appellate review, which Sears presented to the Tenth Circuit and raises again here, cannot be decided by the Board either directly or indirectly, but is only for the courts to adjudicate.

C. MOOTNESS CANNOT BE ASSERTED SO AS TO DENY JUDICIAL REVIEW OF SHORT-TERM ORDERS WHICH ARE CAPABLE OF REPETITION AND WHICH CONSTITUTE PRECEDENT IN FUTURE SIMILAR INSTANCES

Wholly apart from the considerations raised in the foregoing discussion of the elements of the Regional Director's contentions, other factors basic to a just and efficient judicial system impel the conclusion that the instant appeal is not moot.

If the Regional Director is correct in contending that injunctive relief under Section 10(l) necessarily terminates when the Board renders its decision on the merits of the case, then the period during which such relief can exist is quite short. In the instant case, approximately eight and one-half (8½) months elapsed between the district court's ruling on the petition for injunctive relief and the subsequent issuance of the Board's decision. There is no reason known to Sears for doubting that this constitutes a typical period.

Under such circumstances, it would be virtually impossible ever to bring to this Court a case involving charges of judicial malfunction concerning or arising out of the granting or denying of injunctive relief; all such cases would become "moot" as they travelled their way through all the

time-consuming stages of the judicial process which arrives, after the issuance of the Board's decision, in this Court. Yet each error committed below becomes precedent to be used against the interests of litigants who will be similarly unable to obtain review of their own "mooted" appeals. If this Court is ever to decide whether charging parties before the Board have standing to appeal a district court's denial of injunctive relief under Section 10(l), then its vehicle must be such a case as Sears brings here.[16]

Under the circumstances described, this Court has declared its refusal to apply the doctrine of mootness. In *Southern Pacific Terminal Company v. Interstate Commerce Commission, et al.*, 219 U.S. 498, 515-6, the appellant sought to have declared illegal an order of limited duration of the I. C. C., which had expired by its own terms while pending appeal. The Commission defended on the ground that the case had become moot. This Court held that the doctrine of mootness does not apply to such situations, in which public rights and interests are involved and questions of law are presented, whose resolution "might serve to guide the municipal body when again called upon to act in the matter". This Court's extended rationale of its decision in *Southern Pacific* applies equally here:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the

[16] A further difficulty in bringing such cases to this Court results from the fact that a majority of the charges filed with the Board involving violations of law which could result in injunctive relief under Section 10(l) are filed by small employers. During fiscal year 1968, over fifty per cent (50%) of such charges were filed by employers having less than thirty (30) employees. It is unlikely that such employers would be able or willing to expend such sums as would be required to bring their cases here even if they had no reason to fear their being "mooted" out of Court.

case at bar) and their consideration ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

The continuing vitality of the *Southern Pacific* doctrine is evidenced by this Court's recent application of it in *Moore* v. *Ogilvie*, 394 U.S. 814. Nor has that doctrine been affected, as Respondent Union suggests (Br., p. 20), by this Court's decisions in *Brockington* v. *Rhodes*, 396 U.S. 41, and *Hall* v. *Beals*, 396 U.S. 45. The latter cases involved situations in which an individual sought to run for elective office in a specific election (*Brockington*) and vote in a specific election (*Hall*) and was prevented from doing so pursuant to the operation of a statute which had since been amended. Thus, a repetition of the precise injury claimed could never occur; the specific election had passed and the statute had been "corrected." In both *Moore* and the instant case the situation is quite different, as a repetition of the claimed injury was both possible and likely. In the instant case, for example, in any succeeding 10(b) case in which Sears will be involved the same problem of its standing to appeal adverse district court decisions will confront it, pursuant to the same statutory language which is involved here. Moreover, the adverse precedent established by the court below will continue to exert some influence, unless reversed, on every other court in which Sears would seek similar appellate review.

D. THE PUBLIC INTEREST IN THE CLARIFICATION OF CHARGING PARTIES' APPELLATE RIGHTS PRECLUDES A FINDING THAT THE ISSUE IS MOOT

Administrative agencies function essentially as trustees for the public under trusts created by Congress for the welfare and protection of the beneficiaries. The public has a substantial and legitimate interest in the develop-

volving another secondary boycott, the Second Circuit held that

> "Finally, termination of the picketing, the walkout and the particular job itself do not render the Board's order moot."

Decisions of the Sixth Circuit are to like effect, as in *NLRB v. Rockwell Standard Corporation*, 330 F. 2d 280 (C.A. 6, 1964), in which the Court stated that

> "Abandonment of an unfair labor practice does not cause the controversy to become moot."

In *NLRB v. Metal Sweepers, Inc.*, 325 F. 2d 551 (C.A. 7, 1963), the Seventh Circuit expressed its concern over the very present possibility of the resumption of discontinued unfair labor practices. In a case involving alleged unfair labor conduct in connection with a first election, the Board's final and valid second election had been held. The Court stated:

> "Neither compliance with the Board's order nor subsequent certification of the union as bargaining representative renders the case moot. . . . If the employer's motive in the past was to repeat it, how a decision to be legally will not be a futile exercise of judicial function."

These principles have found expression in the cases of *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563 (1950); *NLRB v. Pacific Gas and Electric Co.*, 118 F. 2d 780 (C.A. 9, 1941); *NLRB v. Dinion Coil Co.*, 201 F. 2d 484 (C.A. 2, 1953); *NLRB v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4, 1941); *NLRB v. Ford Motor Co.*, 114 F. 2d 905 (C.A. 6, 1940); *NLRB v. Cheney California Lumber Co.*, 327 F. 2d 795 (C.A. 9, 1964); *NLRB v. Local 294, International Brotherhood of Teamsters*, 282 F. 2d 699 (C.A. 2, 1960); *NLRB v. Local 138, International Union of Operating Engineers*, 257 F. 2d 491 (C.A. 2, 1958); *NLRB v. Local 282, International Brotherhood of Teamsters*, 257 F. 2d 503

stance where the discontinuance occurs after the Board renders its decision as well as before administrative consideration. It has applied to proceedings before the Board and proceedings before the courts of enforcement.

A very recent example of the approach taken by the Board in cases involving the issue of mootness where unfair labor practices have been discontinued and the underlying dispute has been settled in the course of litigation appears in *Hood Industrial Workers of America*, 171 NLRB No. 61 (1968). In that case the Union discontinued its unlawful secondary picketing and executed a collective bargaining agreement with the employer subsequent to the Trial Examiner's finding that unfair labor practices had been committed. The Union and the employer jointly sought the withdrawal of proceedings pending before the Board's consideration of the Trial Examiner's decision on the ground that the matter had become settled and moot. In opposing such withdrawal, the Board's General Counsel argued that the violations which were committed were of a recurring and continuing nature, and that the establishment of a labor agreement in other circumstances [illegible] the unfair labor practice charges of discriminatory discharge and refusal to bargain. The Board agreed with the General Counsel and denied the request to withdraw the charges. [illegible] the dispute nevertheless was not to be considered moot because the [illegible] employer might [illegible] the [illegible] proceedings which would [illegible] a possible [illegible] of unlawful picketing conditions would arise and

An appropriate conclusion to this discussion consists in a famous quotation from *NLRB v. General Motors Corp.*, 179 F. 2d 221 (C.A. 2, 1950), which summarizes the bases for rejecting the concept of mootness in the instant case as well as those which were discussed above:

> "The defendant in an action for an injunction never as a matter of right becomes entitled to a dismissal because after process served he discontinues the conduct of which the plaintiff complains. It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily, that will not be a sufficient weight to the protection of which the plaintiff has shown he was once in need, and which he will need again should the defendant change his mind."

Respectfully submitted,

GERARD SWEENEY,
Attorney for Petitioner.

APPENDIX A

PHILIP HORNBEIN, JR.
Attorney at Law
2007 Security Life Building
Denver, Colorado 80202

June 26, 1969

Mr. Francis Sperandeo, Regional Director
National Labor Relations Board
260 New Custom House
Denver, Colorado 80202

Re: Sears, Roebuck and Co.
Case No. 27-CC-278.

Dear Mr. Sperandeo:

This will confirm my telephone conversation with Mr. Bruce Gillis on this date. I informed him that the Union has not yet decided whether or not to voluntarily comply with the Board's order, but that in the meantime all picketing of Sears will be discontinued.

I further advised Mr. Gillis that we will not resume picketing of Sears without first giving your office at least ten days notice in advance thereof.

Very truly yours,

s/ PHILIP HORNBEIN, JR.
Philip Hornbein, Jr.

PHjr:w

c: Carpet Layers Local Union No. 419.

APPENDIX B

SEARS, ROEBUCK AND CO.
Chicago, Illinois 60607,
Phone 265-2500.

Law Department

September 18, 1969

Francis Sperandeo, Esq.
Regional Director,
Twenty-Seventh Region
National Labor Relations Board
260 New Custom House
Denver, Colorado

Re: Carpet, Linoleum, Soft Tile and
Resilient Floor Covering Layers,
Local Union #419, AFL-CIO

and

Sears, Roebuck and Co.
176 NLRB No. 120 (Civil No. C 1052)

Dear Mr. Sperandeo:

This letter constitutes a formal request by Sears, Roebuck and Co. for information from your files to which Sears believes it is entitled in connection with the captioned cases.

You will recall that in our recent conversation in your offices on September 11, 1969 you confirmed my understanding that sometime subsequent to the issuance of the Board's Order in this case the Union, through its counsel, announced to you by letter its intention to cease for the present its adjudicated unlawful picketing to give you ten (10) days notice should that picketing be resumed, and stated its indecision as to whether to appeal the Board's Order.

We hereby request a copy of the Union's letter

In order to place the relevance of that letter in proper perspective, you will further recall the following background facts:

A. On August 29, 1968 pursuant to a charge filed by Sears protesting the Union's unlawful secondary picketing, your office petitioned the District Court for mandatory injunctive relief under Section 10(l) of the Act.

B. On October 4, 1968 the District Court refused to grant the requested injunctive relief. Sears then appealed this decision to the Tenth Circuit Court of Appeals.

C. On May 15, 1969 the Court of Appeals dismissed Sears' appeal on the ground that Sears lacked standing to prosecute it; the Court did not reach the merits of the dispute.

D. On June 20, 1969 the Board issued its decision finding that the Union had in fact engaged in the unlawful picketing as charged by Sears and as the Board's petition for injunctive relief had alleged.

E. The Union had continued its unlawful picketing throughout this entire period and even subsequent to the Board's Order.

F. On June 6, 1969 as a consequence of the Union's continuing picketing, Sears filed motions for a stay of mandate of the Tenth Circuit and for an injunction pending its appeal of the Tenth Circuit's decision.

G. At the time that Sears' afore described motions were pending the Board conveyed both to counsel for the Union and for Sears its intention to seek injunctive relief against the Union's violation of the Board's Order to cease the continuing unlawful picketing.

H. The Union's letter to which the instant request is addressed was received by you enroute [illegible]

date of the Union's petition for review of that Order in the Court of Appeals for the District of Columbia Circuit on July 3, 1969. Further, this letter was written at a time when Sears' motion for interim injunctive relief was pending and when the Board was preparing independently to seek such relief under Section 10(e) of the Act.

Accordingly, the Union's letter had the effect of terminating or preventing the institution by the Board of projected proceedings in the District Court; it unilaterally affected the remedy to which Sears, as the aggrieved charging party, was entitled and would enjoy as a consequence of that suit; and it effectively undercut Sears' own pending motion for interim injunctive relief.

Under these circumstances, Sears believes that the Union's letter to which we refer constitutes an unauthorized ex parte communication within the meaning and spirit of the Public Information Act, 5 U.S.C. §552 and Section 102.126 of the Board's Rules and Regulations. Although Section 102.128(c) of the Board's Rules appears to limit this doctrine to proceedings before Trial Examiners in cases pending before them, it is clear that the spirit and the very purpose of these Rules requires their extension to all stages of Board proceedings or of resulting court proceedings in which the communication in question has the effect, in the terms of Section 102.126, of "concerning the disposition on the merits of the substantive and procedural issues in the proceeding". Since, as we have noted, the ex parte communication involved here had the effect of forestalling the institution of an action by the Board and also deprived Sears of a desired remedy available therein, the explicit condition for identifying "unauthorized" communications has been met. Sears therefore believes it

purpose to the various situations in which they logically apply, we respectfully direct your attention to various Appellate Court decisions which have effected such extensions in keeping with the spirit of these Rules to enlarge the exchange of relevant information between interested parties. See, for example, *Board of Manitowoc* v. *NLRB*, 335 F. 2d 749 (CA 9, 1964); *NLRB* v. *Safeway Steel Scaffold Co.*, 383 F. 2d 749 (CA 9, 1964); *NLRB* v. *Safeway Steel Scaffold Co.*, 383 F. 2d 273 (CA 5, 1967), cert. den. 390 U.S. 955 (1968); *Pakwaukee* v. *U. S.*, 360 U.S. 343 (1959); and *NLRB* v. *Borden Co.*, 392 F. 2d 412 (CA 5, 1968).

When Sears made an oral request to you on September 11, 1969, for a copy of the Union's letter, you indicated that you would not provide such a copy without the consent of the Union's counsel. That consent was not received. While you thus declined to furnish Sears with a copy of that letter, you did describe its contents, as has been detailed above. In a telephone conversation today, your office indicated a current intention to adhere to your prior decision. This formal request is written in the hope and expectation that upon further consideration, you will reverse that decision. However, if we do not receive a response from you by September 24, 1969, we shall assume that you continue to adhere to your prior refusals.

We should like to add that a copy of this letter is being forwarded to the Union, in accordance with the salutary principle that ex parte communications should be discouraged.

Your expeditious response to this formal request would be greatly appreciated.

Very truly yours,

3. On or about July 29, 1969, Sanders Carpets & Draperies, Inc. (herein called Sanders), pursuant to the provisions of the Act filed a charge with the Board alleging, *inter alia*, that Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. A copy of said charge is attached hereto as Exhibit A and made a part hereof.

4. The aforesaid charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, the Petitioner has reasonable cause to believe that the said charge is true insofar as it alleges that Respondent has violated Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, and that a complaint of the Board, based on said charge should issue against Respondent pursuant to Section 10(b) of the Act. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, is a labor organization within the meaning of Section 2(5), 8(b), 8(e), and 10(l) of the Act, and has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office at 1129-15th Street, Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial

district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(c) At all times material herein George Cooney has been financial secretary and business manager of the Respondent, and Paul G. Wishard and Richard Giesler have been field representatives of Respondent.

(d) Sanders, a Colorado corporation, is engaged at 429 South Colorado Boulevard, Denver, Colorado, in the sale and distribution of carpets at retail. In the course and conduct of its business, Sanders annually distributes and sells annually within the State of Colorado, goods and materials and other merchandise having a gross value in excess of $500,000, of which goods and materials valued in excess of $50,000 are transported directly to the State of Colorado from points outside that State.

(e) At all times material herein, Sanders has not been engaged in business in the construction industry.

(f) At all times material herein, Sanders, in the course and conduct of its business, has subcontracted all of its carpet installation work and has employed no employees for the purposes of installing carpet.

(g) Sanders is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

(h) James Leeman and Donald D. Goldtrap are engaged as a partnership in the business of carpet installing in Denver, Colorado. In the course and conduct of its business, Leeman and Goldtrap regularly provide services to Sanders, among others.

(i) On or about July 15, 1966, Respondent and Sanders executed a written agreement effective from July 1, 1966, until July 31, 1969, whereby Sanders agreed to give all of its floor covering work to a concern, or concerns, paying

prevailing union wages and paying all fringe benefits as provided for in the Collective Bargaining Agreement entered into by Respondent and other floor covering employers. A copy of said Agreement is attached hereto and made a part hereof, as Exhibit B.

(j) At no time material herein has Respondent been the collective bargaining representative of any employees of Sanders.

(k) On or about July 29, 1969, Respondent demanded that Sanders enforce the above contract provisions that would require Sanders to give all of its floor covering work to a concern or concerns paying certain prevailing union wages and paying Union fringe benefits and to cease doing business with other persons who do not pay the specified rates and fringe benefits.

(l) Since on or about July 28, 1969, Respondent has attempted to force or require Sanders to cease using, selling, handling, transporting or otherwise dealing in the products of Goldtrap and Leeman, or to cease doing business with Goldtrap and Leeman.

(m) In furtherance of the aforesaid attempt to force or require Sanders to cease using, selling, handling, transporting or otherwise dealing in the products of Goldtrap and Leeman, or to cease doing business with Goldtrap and Leeman, and in furtherance of the aforesaid attempt by Respondent to compel Sanders to enforce the aforementioned contract provisions, since on or about July 28, 1969, Respondent did authorize, establish, and maintain pickets at the premises of Sanders at its place of business at 429 South Colorado Boulevard, Denver, Colorado.

(n) By the acts and conduct set forth in subparagraphs (k), (l), and (m) above, Respondent has engaged in, and has induced and encouraged individuals employed by Sanders to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport,

or otherwise handle or work on goods, articles, materials, or commodities, or to perform services, and has threatened, restrained and coerced Sanders.

(o) An object of the acts and conduct engaged in by Respondent, set forth in paragraphs (k), (l), (m) and (n) above, was, and is, to force or require Sanders to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with the partnership of Goldtrap and Leeman.

6. It may be fairly anticipated that, unless enjoined, Respondent will continue or repeat the acts and conduct set forth in paragraph 5, subparagraphs (k), (l), (m), (n), and (o) above, or similar or like acts and conduct in violation of Section 8(b)(4)(i)(ii), subparagraph (B) of the Act. It is therefore essential, appropriate, just and proper for the purposes of effectuating the policies of the Act in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

WHEREFORE, Petitioner prays:

1. That the Court issue an Order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participating with them, pending the final disposition of the matters involved herein pending before the Board from:

(a) Picketing at or in the vicinity of the premises of Sanders or at locations where Sanders' products are being installed.

(b) In any manner or by any means, including picketing, orders, directions, instructions, requests, or appeals, however given, made or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging any individual employed by Sanders, or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any service, or in any manner or by any means, threatening, coercing, or restraining Sanders, or any other persons engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Sanders or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of or to cease doing business with the partnership of Goldtrap and Leeman.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 12th day of August, 1969.

/s/ FRANCIS SPERANDEO,
Francis Sperandeo,
Regional Director
Twenty-Seventh Region
National Labor Relations Board

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

W. BRUCE GILLIS, JR.,
Regional Attorney, Region 27.

/s/ RICHARD J. WISE
Richard J. Wise,
Board Attorney

National Labor Relations Board
Twenty-Seventh Region
260 New Custom House, 721 - 19th Street
Denver, Colorado Telephone 297-3551

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

Witness my hand and Seal of said Court this 16th day of September 1967.

G. WALTER BOWMAN,
Clerk

By /s/ R. J. HALL,
Deputy

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil No. C-672

CLYDE F. WAERS, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CARPET, LINEOLEUM AND RESILIENT TILE LAYERS UNION No. 419, AFL-CIO, *Respondent.*

Petition for Injunction Under Section 10(l) of the National Labor Relations Act, as Amended

To the Honorable, the Judges of the United States District Court for the District of Colorado:

Comes now Clyde F. Waers, Regional Director of the Twenty-Seventh Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U. S. C., 160(1) (herein called the Act) for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a charge alleging that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(7), subparagraph (C) of the Act. In support thereof, Petitioner respectively shows as follows:

1. Petitioner is Regional Director of the Twenty-Seventh Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is involked pursuant to Section 10(1) of the Act.

3. On or about January 2, 1968, Aristocraft Counter and Floor Covering, Inc. (herein called Aristocraft), pursuant to provisions of the Act, filed a Charge with the Board alleging that Carpet, Lineoleum and Resilient Tile Layers Local Union No. 419, AFL-CIO (herein called Respondent), a labor organization, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(7), subparagraph (C) of the Act. A copy of said Charge is attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid Charge was referred to Petitioner as Regional Director of the Twenty-Seventh Region of the Board.

5. Upon the basis of the following, Petitioner has reasonable cause to believe that said charge is true and has accordingly on January 22, 1968, on behalf of the Board, issued a Complaint of the Board based on said Charge pursuant to Section 10(b) of the Act. A copy of said Complaint is attached hereto as Exhibit 2 and made a part hereof. More particularly, Petitioner has reasonable cause to believe, and believes, that Respondent is a labor organization within the meaning of Section 2(5), 8(b), and 10(1) of the Act, that George Cooney, Paul Wishard, and Billy Vice are agents of Respondent within the meaning of Section 2(13), 8(b) and 10(1) of the Act, and that said Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(b)(7), subparagraph (C) of the Act, affecting commerce within the meaning of Sections 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organization in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) At all times material herein, George Cooney has been financial secretary of Respondent, Paul Wishard has

been Business Representative of Respondent, and Billy Vice has been an employee and agent of Respondent.

(c) Respondent maintains its principal office at Denver, Colorado, and at all times material herein, Respondent has been engaged within this judicial district in transacting business and in promoting and protecting the interests of the employee members of Respondent.

(d) Aristocraft is engaged at Denver, Colorado, in the sale and installation of floor covering and tile. During the last twelve months, which period is representative of all times material herein, Aristocraft, in the course and conduct of its business operations, received goods and materials valued in excess of $7,000 at its Denver, Colorado, operation, directly from points outside the State of Colorado; and received goods and materials valued in excess of $50,000 at its Denver, Colorado, operation from other enterprises, including *inter alia*, William Volker & Company, Larson Distributing Company, Western Appliance Corp., Wholesale Flooring, Inc., Wholesale Ceramic Tile, Inc., and Downs Supply Co., all of Denver, Colorado, which other interprises had received the said goods and materials directly from points outside the State of Colorado.

(e) Respondent is not currently certified as the representative of any of Aristocraft's employees.

(f) No charge has been filed with the Board under Section 8(a)(2) of the Act alleging that Aristocraft has unlawfully recognized, or assisted any labor organization.

(g) Notwithstanding the aforesaid, Respondent, since on or about August 8, 1967, has demanded that Aristocraft recognize and bargain with Respondent as the representative of Aristocraft's floor covering and tile installation employees, and Respondent has been attempting to compel Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative.

(h) In furtherance of the aforesaid demand for recognition and bargaining and attempt to compel Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative(Respondent, at all times material since on or about December 7, 1967 (excluding the period from January 3 to January 8, 1968), has picketed Aristocraft at various of Aristocraft's job installation sites in Denver, Colorado.

(i) An object of Respondent's picketing set forth in subparagraph (h) above, is to force or require Aristocraft to recognize or bargain with Respondent as the representative of Aristocraft's floor covering and tile installation employees, and to force or require Aristocraft's floor covering and tile installation employees to accept or select Respondent as their collective bargaining representative notwithstanding that Respondent is not currently certified as a representative of such employees.

(j) Respondent engaged in the activity set forth in paragraph 5, subparagraphs (h) and (i) above notwithstanding that no valid petition under Section 9(c) of the Act involving employees of the Employer has been filed within a reasonable period of time from the commencement of such picketing.

(k) It may fairly be anticipated that, unless enjoined, Respondent will continue or repeat the acts set forth in paragraph 5, subparagraphs (h) and (i) above or similar or like acts and conduct in violation of Section 8(b)(7), subparagraph (C), of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(l) thereof, that, pending final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct above alleged, similar acts and conduct, or repetitions thereof.

Wherefore, Petitioner prays:

1. That the Court issue an order directing Respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue, enjoining and restraining Respondent, its officers, agents, servants, employees, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Continuing their current picketing of Aristocraft, where an object thereof is to force or require Aristocraft to recognize or bargain with Respondent, or any other labor organization, as the reprsentative of Aristocraft's floor covering and tile installation employees, or to force or require Aristocraft's employees to accept or select Respondent, or any other labor organization, as their collective bargaining representative until the Board determines that a question concerning representation of Aristocraft's employees may appropriately be raised under Section 9 of the Act.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining Respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and proper.

Dated at Denver, Colorado, this 23rd day of January, 1968.

/s/ CLYDE F. WAERS
Clyde F. Waers,
Regional Director
National Labor Relations Board
Twenty-Seventh Region
260 New Custom House
721 19th Street
Denver, Colorado 80202

ARNOLD ORDMAN,
General Counsel

DOMINICK L. MANOLI,
Associate General Counsel

JULIUS G. SEROT,
Assistant General Counsel

FRANCIS SPERANDEO,
Regional Attorney, Region 27

W. BRUCE GILLIS, JR.,
Attorney

RICHARD J. WISE,
Attorney
National Labor Relations Board
Twenty-Seventh Region
260 New Custom House
721 19th Street
Denver, Colorado 80202
Telephone No. 297-3551

I, the undersigned, Clerk of the United States District Court for the District of Colorado, do certify that the foregoing is a true copy of an original document remaining on file and record in my office.

Witness my hand and Seal of said Court this 16th day of Sept. 1969.

G. WALTER BOWMAN,
Clerk

By /s/ R. J. HALL,
Deputy

APPENDIX G

February 10, 1969

Mr. Arnold Ordman
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: Sears, Roebuck and Co. Case No. 27-CC-278

Dear Mr. Ordman:

As you probably know by this time Trial Examiner Maurice M. Miller issued his decision in the above-captioned case on February 6, 1969. In his decision he found that the activity engaged in by the Respondent Union was violative of Section 8(b)(4)(B).

On September 27, 1968 the District Court for the District of Colorado denied to the Regional Director a temporary restraining order which he sought pursuant to Section 10(l) of the Act. It is obvious that the District Court did not understand its role in a Section 10(l) proceeding and, if the District Court had the advantage of the Trial Examiner's thinking, he would not have dismissed the petition. Therefore, on behalf of Sears, Roebuck and Co., it is hereby requested that you now proceed pursuant to Section 10(j) of the Act and once again request temporary relief from the District Court. In the alternative, we suggest that you join with us in our appeal before the United States Court of Appeals for the Tenth Circuit.

When the violation of the Act is as obvious as it is in this case, we would think that the General Counsel's office would be able to afford us with some relief.

Very truly yours,

Kalvin M. Grove
For Lederer, Barnhill & Fox

cc: Mr. Julius Serot
Associate General Counsel

cc: Mr. Francis Sperandeo
Regional Director—Denver

APPENDIX H

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20570

February 26, 1969

Kalvin Grove, Esquire
Lederer, Barnhill and Fox
Chicago Title and Trust Building
111 West Washington Street
Chicago, Illinois 60602

Re: Sears, Roebuck and Co. Case No. 27-CC-278

Dear Mr. Grove:

Your letter of February 10, 1969, to the General Counsel has been referred to me.

The issuance of the Trial Examiner's Decision does not in our view warrant any further proceedings in the district court or any appeal on our part from the dismissal of the 10(l) petition, even assuming that the Rules of Civil Procedure or other rules of court permitted such proceedings at this time. Although the Trial Examiner's Decision might have had some relevance to the question of reasonable cause had it been issued prior to the determination by the district court it is, of course, only a recommendation to the Board rather than a Board decision and in the circumstances does not warrant reopening of the district court proceedings. Nor do we believe that it would be appropriate to institute new proceedings under Section 10(j) of the Act, even if that Section were applicable to this type of unfair labor practice, to secure the relief under this section, upon the same evidence, which a district court has already denied.

Additionally, with respect to our participating as an appellant in the pending appeal, we note that the time for us to appeal has long since expired.

I do not suggest that we agree with the dismissal of our petition nor that we disagree with the Trial Examiner's Decision. We are of the opinion, however, for the foregoing reasons, that the action you request us to take would not be warranted.

With kind regards,

Sincerely,

JULIUS G. SEROT
Julius G. Serot
Assistant General Counsel

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JUN 6 1970
JOHN F. DAVIS, CLERK

No. 476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK AND CO., *Petitioner*

v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING OF SEARS, ROEBUCK AND CO.

BRICE I. BISHOP
PHIL B. HAMMOND
Suite 420
1819 H Street, N. W.
Washington, D. C.
Attorneys for
American Retail Federation
as Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1969

No. 476

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v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING OF SEARS, ROEBUCK AND CO.

INTEREST OF THE AMICUS CURIAE *

The interest of the American Retail Federation (hereinafter referred to as the "Federation") in this case was fully set forth in its Brief in Support of the Petition for Writ of Certiorari, which was filed pursuant to permission granted by Order of this Court

* This brief is filed with the written consent of counsel for both parties in accordance with Rule 42(2) of the Court.

when consent of all parties was not given, and its Brief in Support of the Position of the Petitioner. The thrust of those briefs was that the instant case raised recurrent and important questions of first impression, concerning an area of vital interest to the retail industry and all employers, which warranted this Court's attention. The Court's subsequent failure to resolve these questions—and the virtual certainty that future efforts to obtain such a resolution by this Court will similarly be frustrated by a determination that the particular controversy involved is "moot"[1] —only underscores the Federation's concern.

The Federation is aware that "the Court has rightly been parsimonious in ordering rehearings", but it also concurs in Mr. Justice Frankfurther's observation that "the occasions on which important and difficult cases have been reargued have . . . enchanced the deliberative process".[2] The instant situation presents such an "important and difficult" case. It is probable that,

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[1] In its Reply Brief, the Petitioner asserted that it had no reason to doubt that the 8½ months which elapsed in the instant case between the district court's ruling on the petition for injunctive relief and the subsequent issuance of the Board's decision was not a typical period (Reply Brief, p. 19). Clearly, therefore, based on this assumption, if the present case is deemed moot it would be practically impossible for an employer ever to obtain review by this Court of the issues here involved prior to a Board decision rendering the controversy moot. Yet, as the Petitioner observed, each erroneous district court decision "becomes a precedent to be used against the interest of litigants who will be similarly unable to obtain review of their own 'mooted' appeals" (Reply Brief, p. 20). Cf. the reference in Mr. Justice Marshall's dissent in *Hall* v. *Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 220, to the dangers of "misleading precedent" as "one of the unfortunate consequences of a rigid view of mootness."

[2] *City of Detroit* v. *Murray Corp.*, 357 U.S. 913, 915 (dissenting opinion).

unless rehearing is granted, the Court will not again have the opportunity to pass on the critical issues involved herein;[3] this ground alone is sufficient, as the Court has recognized in other cases,[4] to warant rehearing. In addition, based on contentions *not* discussed by the Court in its opinion,[5] the Federation believes

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[3] See footnote 1, *supra*.

[4] See, e.g., *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47. Cf. *Silver King Co.* v. *Conkling*, 256 U.S. 18 and *Parks* v. *Simpson Timber Co.*, 389 U.S. 909.

[5] Although the Petitioner advanced various arguments as to why the instant case should not be considered moot (Reply Brief, pp. 12-27), the Court's opinion only addressed itself to the Petitioner's contention that there had not yet been a "final adjudication of the Board" here within the meaning of section 10(1), an argument which was rejected in light of Section 10(e) of the Act. While the *amicus* does not desire to reargue this point, and will only seek to demonstrate the lack of mootness of the present controversy on the basis of arguments *not* dealt with in the Court's decision, two brief comments should be made as to the adequacy of the relief afforded by Section 10(e). First, an injunctive remedy under Section 10(e) does not become available until both a Board order has issued and an enforcement or review proceeding has been commenced in the court of appeals, an elapsed period in the instant case of nearly one year, during which no protection is available, if 10(l) relief is denied, for the employer confronted by unlawful union picketing. Second, the *amicus*' research disclosed only one case where the Board sought to obtain 10(e) injunctive relief in a secondary boycott situation, *N.L.R.B.* v. *District Council of Ports of Puerto Rico International Longshoreman's Ass'n*, unreported decision of the First Circuit Court of Appeals, March 21, 1953, Vol. VIII, *Court Decisions Under the NLRA*, p. 821, and in that case such relief was denied on the basis that the acts there complained of also constituted "new and independent unfair labor practices in respect to which the Board is empowered to issue a new complaint . . ." Thus, as a union attorney recently concluded, the Board "has almost never sought preliminary relief in the Courts of Appeal [under Section 10(e)] and has never asked for the priority treatment which the statute provides Board cases." Driesen, *The Uses and Abuses of Litigation in Labor Relations*, reported in 97 D.L.R. at Section F (BNA, May 19, 1970).

that the present controversy has not been rendered moot and that, for this further reason, hearing should be granted.[6] In short, the Federation again respectfully submits that the Court should resolve the issues of great public importance raised by the denial to employers of valuable rights intended to be exercised as part of the statutory scheme of the National Labor Relations Act.

ARGUMENT

A.

The paramount interest in appellate review, particularly as a check on abuse at the trial level, demands facilitation of appeals.[7] The mootness doctrine should not be applied to frustrate "the vital importance of keeping open avenues of judicial review'" nor to permit lower courts to be courts of last resort for the determintaion of important issues.[8] As one commentator recently noted: "If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of

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[6] See, e.g., *Cafeteria Employees Union* v. *Angelos*, 319 U.S. 753, 778 and *Brady* v. *Terminal R.R. Ass'n*, 302 U.S. 678, 688, 303 U.S. 10. Cf. *Hickman* v. *Taylor*, 327 U.S. 808, 328 U.S. 808, 876, 329 U.S. 495 and *Brinkerhoff-Faris Trust Co.* v. *Hill*, 280 U.S. 530, 604, 281 U.S. 673.

[7] See, e.g., *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict excess to judicial review") and *St. Joseph Stock Yards Co.* v. *U.S.*, 298 U.S. 38, 84 (concurring opinion) ("The Supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly.")

[8] *Sibron* v. *New York*, 392 U.S. 40, 52.

[9] Cf. Mr. Justice Marshall's dissent in *Hall* v. *Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 220.

the inherent nature of the issue, the Court should not refuse review on the basis of mootness."[10] And surely this principle is particularly pertinent where substantial public rights would otherwise remain in judicial limbo. In such a case, the importance of the question involved, *standing alone*, may be sufficient to override technical mootness requirements.[11]

The foregoing considerations are especially apropos in the instant case. This Court has understandably been sensitive to the rights of private parties in proceedings before the National Labor Relations Board,[12] as well as to the rights of private parties in administrative proceedings generally.[13] It also has been in-

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[10] Comment, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1692 (1970).

[11] Cf. *Powell* v. *McCormack*, 395 U.S. 486, 496 and n. 8, where this Court refused to dismiss as moot the claims of various constituents of Congressman Powell, objecting to his exclusion from the 90th Congress, notwithstanding the intervening termination of that session of Congress, the seating of Congressman Powell in the 91st Congress, and the "personal" nature of his "viable" salary claim (395 U.S. at 565, n. 9 (dissenting opinion)). See also *Friend* v. *United States*, 388 F. 2d 579 (D. C. Cir., 1967); *Dyer* v. *Securities and Exchange Commission*, 266 F. 2d 33 (8th Cir., 1958); and Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 Univ. Pa. L. Rev. 125 (1946).

[12] *United Automobile Workers* v. *Scofield (Fafnir Bearing Co.)*, 382 U.S. 250, where private parties were accorded rights of participation in Board proceedings notwithstanding that they could rely upon the General Counsel of the Board to present their cases on appeal. Accordingly, the private parties there had some protection available against the erroneous deprivation of their statutory rights. Here, however, unless the charging party is afforded standing to initiate an appeal from an erroneous district court 10(l) decision he will have no relief available from that decision when the Board refuses to appeal.

[13] See *Association of Data Processing Service Organization, Inc.* v. *Camp*, — U.S. —, 25 L.Ed. 2d. 184 (March 3, 1970) and *Barlow* v. *Collins*, — U.S. —, 25 L.Ed. 2d 192 (March 3, 1970).

creasingly concerned with delineating the proper accommodation to be reached between federal labor laws and the Norris-LaGuardia Act.[14] Congress similarly has evidenced a considerable interest in the regulation of unlawful strikes.[15] All of these important considerations are at the crux of the present case. Indeed, the Court now has before it, if such matters have not also been rendered moot, other important aspects of the overall issue of the right of charging parties to participate in Section 10(1) cases.[16] In these circumstances, and in view of the considerable difficulty that other employers will have in prosecuting appeals to this Court involving such questions,[17] the issues

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[14] See, e.g., *The Boys Markets, Inc.* v. *Retail Clerks Union*, Local 770, No. 768, *this term*; *Atlantic Coast Line R.E. Co.* v. *Operating Engineers*, No. 477, *this term*.

[15] See, e.g., *Hearings Before the Special Committee on Labor, Education and Labor, on H.R. 11725*, House, 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on the Separation of Powers, Committee on the Judiciary, on Congressional Oversight of Administrative Agencies (NLRB)*, Senate, 90th Cong., 2nd Sess. (1968).

[16] *Samoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, No. 1481, *this term*, where the district court, notwithstanding the express rights of participation accorded charging parties by the Section 10(1), nevertheless ruled that the charging parties there involved did not constitute "parties" and, accordingly, lacked standing to object to a proffered Board stipulation. The Federation also understands that a petition for a writ of certiorari to the Ninth Circuit will soon be filed in *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, — F. 2d —, 69 LRRM 2535 (1969), *cert. den.*, — U.S. —, 69 LRRM 2537, based on the Court of Appeals' refusal to permit the charging party there involved to litigate the merits of the district court's dissolution of a previously-granted 10(1) injunction.

[17] See footnote 1, *supra*. In addition, the majority of members of the Federation are small employers whom the Federation is well aware can not bear the cost of appeal to this Court, particularly when, under the Court's decision in this case, that appeal

here presented are now in an appropriate posture for final resolution by this Court.

B.

Apart from the compelling reasons of public policy which in themselves fully justify a resolution of this case on its merits, a finding of mootness here detracts from, rather than advances, the successful operation of the judicial process. If, as stated in *Flast* v. *Cohen*, 392 U.S. 83, 106, the mootness doctrine is intended to insure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution", all of these prerequisites have been amply met in the instant case.[18]

Moreover, in contrast to the usual case where mootness is brought about by some event over which neither

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will probably be frustrated by issuance of the Board's order in the underlying Section 8(b) proceeding rendering such an appeal moot. Since employers with less than 30 members filed over 50% of the charges involving Section 10(l) in fiscal year 1968 (Thirty-third Annual Report of the National Labor Relations Board, Table 18, pp. 238-9), the Court's refusal to pass on the issues here involved effectively removes the only practical potential for resolution by this Court of such questions presented.

[18] The question of mootness in the present case was raised when the Court was considering the petition for writ of certiorari. Resp. NLRB's Br. in Opp., p. 2. This is not a case, therefore, where the occurrence of an event subsequent to the granting of certiorari moots the issues and dampens the interest of one of the parties in fully arguing the issues. To the contrary, here every reason existed for the parties to believe that the Court would resolve the questions involved on their merits and, accordingly, all of the contentions of the parties, as well as those of the *amici*, were fully advanced.

party has control, here the Board, one of the active litigants involved, may itself foreclose the channels of appeal by issuance of its order prior to a review of the 10(1) questions by this Court.

In these circumstances, even if it is assumed that "this Court cannot, in the present state of the record, render an effective judgment on the merit", the Court should nevertheless, "in the exercise of its supervisory appellate power, make such disposition of the case as justice may require".[19] As in *Goldberg* v. *Kelly*, . . .

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[19] *Walling* v. *Reuter Co., Inc.*, 321 U.S. 671. See also *Robinson* v. *California*, 371 U.S. 905. In *Walling*, the government urged exactly the opposite of its position in the present case, that the Court should affirm the issuance of an injunction notwithstanding that the respondent-employer, a corporation, was completely dissolved while the case was pending on appeal and, hence, there was no way in which an effective judgment on the merits could be rendered. This Court nevertheless held that the petitioner should not be deprived of the benefit of the injunction because of the present inability to issue and enforce injunctive relief, stating:

> "But review of a judgment of the District Court contemplates more than a consideration of the case by the Circuit Court of Appeals alone. The losing party in that court may secure further review here upon certiorari, if he so desires and if this Court, in its discretion, grants the writ. Thus appellate review of the judgment of the District Court had not been completed when respondent was dissolved, and the full review contemplated by the statute was frustrated by that dissolution. By reason of that action, the judgment of the Circuit Court of Appeals, which is not final because the case is pending in this Court, cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court."

So also, in the instant case, the process of review had been initiated prior to the intervening issuance of the Board's decision. Since that process of review had not taken its full course, under the rationale of *Walling*, the full appellate process should not be frustrated by an event occurring *in media res*.

U.S. ..., 25 L. Ed. 287 (1970), the "underlying questions" remain unresolved, the continuing adverse position of the Board is assured, and the plaintiff, in effect, represents a class of interested persons.[20] The inherent nature of the issue here involved should not be a perpetual bar to judicial review by this Court of the critical questions presented.

C.

This Court has repeatedly recognized that where the dispute involved is a continuing one, whose consideration might otherwise be defeated "by short term orders, capable of repetition, yet evading review", the mootness doctrine should not be applied so as to bar review as the result of the time-consuming nature of the judicial process.[21] As in those cases, there is a lingering importance of the questions presented to *all* employers, rather than to just the particular litigant involved; there is also a substantial possibility of repetition of the erroneous decision of the district court, particularly in view of the unabated influence of the decision below, is considerable; and the potential that substantial cases will also evade review by this Court

[20] See Comment, 83 Har. L. Rev., *supra* at n. 10, at n. 87 and at pp. 1687-1692.

[21] *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, cited with approval in *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, as well as in *Moore* v. *Ogilvie*, 394 U.S. 814, 816, where the Court found the issue there involved not moot because it reflected "a continuing controversy". See also *Sibron* v. *New York*, 392 U.S. 40, 52-3, where the Court's refusal to find a case moot was predicated, in part, on the state's ability to otherwise cut off final federal review in "whole classes of such cases" and the Court's inability thereby to afford a remedy against "repetitions" of the action there complained of.

is similarly high.[22] Clearly, therefore, application of the *Southern Pacific* doctrine is warranted in the instant case.[23]

CONCLUSION

In view of the foregoing, the Petition for Rehearing should be granted and, based on the reasons set forth in the Federation's previous *amicus* brief as well as in the briefs of the Petitioner the decision of the Court below should be reversed.

Respectfully submitted,

Bruce J. Bishop
Phil B. Hammond
Suite 420
1819 H Street, N. W.
Washington, D. C.
Attorneys for
American Retail Federation
as Amicus Curiae

Of Counsel:

Shimmel, Hill & Bishop
Suite 420
1819 H Street, N. W.
Washington, D. C.

[22] See footnote 1, *supra*.

[23] It is respectfully submitted, in agreement with the contentions of the Petition for Rehearing, that the Court's citation to *Brockington v. Rhodes*, 396 U.S. 41, and *Hall v. Beals*, 396 U.S. 45, in which the *Southern Pacific* doctrine was not invoked, is misplaced. *Brockington* involved a dispute which could never reoccur because the specific election those involved was over and there was no indication the petitioners would ever run again. *Hall* also involved an election which had already been conducted and, because of an amendment to the statute, the questioned residency requirement had been removed. In the instant case, the issue of whether an aggrieved employer is entitled to appeal an adverse 10(l) determination remains a viable one. Congress has not amended the statute by either granting or denying such a right. And, because 10(l) relief is of vital importance to the employer facing an unlawful strike, it is highly likely that the question here involved will arise time and time again.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 476

SEARS, ROEBUCK AND CO.,

Petitioner,

—*vs.*

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

AND

FRANCIS SPERANDEO, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorney for Petitioner.

Of Counsel:

ALAN RAYWID,
COLE, ZALSTEIN & RAYWID,
2011 I Street, N. W.,
Washington, D. C. 20006,

KALVIN M. GROVE,
LEIBERG, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

DONALD L. GIACOMINI,
ROTHGERBER, APODACA & POWERS,
2910 Security Life Building,
Denver, Colorado 80202.

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IN THE

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OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO.,

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vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

AND

FRANCIS SPERANDEO, Regional Director of the Twenty-Eighth Region of the NATIONAL LABOR RELATIONS BOARD,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

On April 27, 1970 this Court rendered a decision holding the instant case to be moot, notwithstanding the Court's prior granting of the Petition for Writ of Certiorari which had been opposed on the basis of such mootness, and without addressing itself to the merits of the substantive questions which had been briefed and argued orally to the Court.

Petitioner, Sears, Roebuck and Co., had sought as an adjudication here of its right to obtain appellate review of a district court's refusal to grant injunctive relief pursuant

to Section 10(l) of the National Labor Relations Act, 29 U. S. C. § 160(l), when the Board declined to appeal. This Court's finding of mootness was predicated on the fact that the Board had rendered a "final adjudication" of the merits of the underlying dispute, to which injunctive relief under Section 10(l) was ancillary, prior to this Court's decision, since the rendering of such a "final adjudication" was said to terminate Soars' right to injunctive relief even had it been granted by the district court, this Court held that the question of the propriety of its denial had become moot.

The instant Petition for Rehearing, filed pursuant to Rule 58 of the rules of this Court, is based upon the following contentions: (a) the general tests governing the granting of such petitions, including the intervention of new and relevant matters, are satisfied; (b) in rendering its judgment that the case was moot the Court applied principles and authorities which were inappropriate to the facts while failing to apply and rely upon other established principles and authorities which were appropriate and which would have yielded a contrary result; and (c) the Court's decision not only failed to effect a needed clarification of the meaning and limits of Section 10(l), as even the Board expressed a hope it would do, but that decision affirmatively contributed to an existing confusion in the interpretation of this Court's opinions on mootness.

In view of this existence of such an increasing uncertainty [illegible] the important and still developing area of the Court's mootness-holding, an area which has also elicited

substantial scholarly criticism, together with the continuing need to explicate the undecided limits of Section 10(c), petitioner respectfully urges the granting of this Petition for Rehearing in its own interest and in the interest of an orderly and generally beneficial development of the Law.

I EVENTS OCCURRING SUBSEQUENT TO THIS COURT'S DECISION HEREIN WARRANT AND SUPPORT THE GRANTING OF A REHEARING

In evolving its practice with respect to the treatment of petitions for rehearing, this Court has recognized, as grounds which warrant rehearing, the subsequent decision or filing in this Court of cases involving the same or similar issues. Accordingly, this Court has granted a petition for rehearing of a decided case both when there existed an intervening and inconsistent Supreme Court decision and when the same or related issue subsequently came before the Court in another pending case. Each of these circumstances is present in the instant matter and warrant the granting of a rehearing here.

A The Rendering of an Intervening Inconsistent Decision

In *N.L.R.B. v. Boaz Spinning Co.*, 352 U.S. No. 140, this Term, decided subsequent to *Scott*, this Court held that case not to be moot although the dispute involved there was substantially less viable than in *Scott*, where this Court reached a contrary result. In *Boaz* the unfair labor practices committed, which had occurred in connection with a representation election, had entirely ceased. The respondent employer had complied with the Board's remedial order. The Board had thereafter conducted a second election